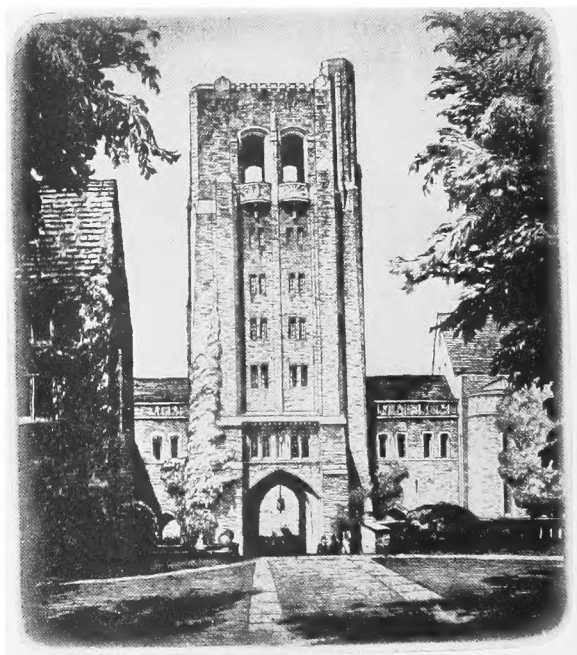


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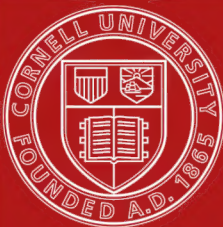
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A TREATISE
ON THE
MODERN LAW OF REAL PROPERTY

AS EXPOUNDED BY OUR
Courts of Last Resort,
STATE AND FEDERAL.

BY FRANK S. ^{over}RICE,
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Author of "Civil and Criminal Evidence" and "American Probate Law."

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1897.

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PREFACE.

For nearly five centuries the judiciary of the English-speaking race have been employed, with little intermission, in hearing arguments, considering precedents, balancing effects, and reaching conclusions regarding the law of real property. Their labors have been herculean, and the stupendous volume of litigation on this branch of law is something positively appalling. It would, indeed, be a standing reproach to the judicial system of the civilized world, if, after all these centuries of argument and reflection, we had not reached bed-rock foundation at last for many subordinate topics of this law which have been most frequently in the foreground. In the United States, we are especially indebted to the phenomenal expansion of our equity jurisprudence, to which, unhampered by the manacles of precedent and *stare decisis*, we may ascribe, in great measure, the stability and certitude of our real property laws. While there are still obscurities to be illuminated, absurdities to be pruned away, and contradictions to be reconciled; while much remains to be done, yet vastly more has been accomplished. If we have not succeeded in coördinating all of the unruly topics into precise and epigrammatic phrase, we have witnessed some remarkable achievements in systematizing the law of "joint estates," "testamentary dispositions," and "mortgage conveyances."

Indeed, topically considered, these three subjects may be regarded as wholly removed from the debatable ground they once occupied, and to now rest upon rules of interpretation and procedure that are generally recognized by bench, bar, and commentator alike. Such a conclusion is abundantly warranted by the facts, and we have not far to go for the causes that have effected such a result. The vast expansion of wealth, coupled with our limitless opportunities for acquiring landed estates, has fostered the morbid development of the legal and equitable principles that underlie these subjects. And no court in any of our

jurisdictions ever passed a term without the mature consideration of many cases expository of the laws that give strength and entablature to our real property relations. The consequence has been an immense volume of decision, from which equitable formulas could be drawn and welded into a coherent and homogeneous system which strongly appealed to the educated intelligence and judgment of our best equipped jurists.

Notwithstanding the great natural expansion of the subject under review, it is believed that by the systematic application of a few exclusionary rules that will in no wise affect its symmetrical development, we can compass the entire discussion within the covers of a single volume. These exclusionary rules, in their ultimate expression, mean simply this: First, there must be no protracted discussion of the settled law. Principles and their applications that are beyond controversy, exception, or demur may be briefly stated, a few of their supporting authorities cited, and then left. "It is a great art to know when to have done," and nothing is so exasperating to the modern student in this "lawless science of the law" as the constantly reiterated tendency to drone through interminable reams of print in the extended discussion of a legal proposition that has attained the full dignity of a settled law, recognized in all our courts and by all our judges and capable of epigrammatic statement. It is the controverted phases that need exploiting. Illuminative comment and exposition is never out of place when applied to the vexatious contradictions and intricacies that so frequently present themselves in the law of real property, and there is no lawyer of any repute or standing whatever, who does not know that in the stress and swirl of a hotly contested case, his need is for authorities sustaining doubtful propositions—that will present the contra view—or that will limit, distinguish and even overrule the earlier adjudication. And upon the apt collation and exegesis of controverted theories much of the true value of a text-book depends. The debatable propositions around which controversy is still surging—those that tenaciously refuse to yield to assimilative and harmonious treatment—that present doubts and obstacles, and obtrude a constant theme for conjecture and argument—these are the ones pressing for interpretation, and imperiously demanding the best efforts of scholarship as to treatment and illustration.

Another rule has influenced this undertaking and made possi-

ble the contraction of the subject to the space we have allotted to it, and that rule reads: "portray the law as it is, and not as it was or ought to be." This maniacal tendency to probe into the root of things is highly commendable—in an antiquarian or a scholarly recluse. But the active lawyer, with his case in court, is rarely bent on poring over the law of Feoffment in the time of Queen Anne, or the Shellyite controversy in the reign of Bloody Mary. Conversely, he is not enthralled with Blackstone's speculations on the advantages of Primogeniture, or that weirdly fascinating topic of Præmunire. In other words, what the law was, or what the law ought to be, is a matter of supreme indifference. There is but one refrain in his ears, and it sounds like the thunder of the Apocalypse. *What is the law now?*

Again, we can greatly economize space by refraining from the duplication of discussion in cognate topics. Take the subject of waste as a fruitful instance of the effect of this observance. It is universally conceded that any real property relation that involves the presence of mutual rights and joint interests has, as its invariable concomitant, the postulate that no one owner can imperil or prejudice the rights and interests of his co-owner by any act whatever in the nature of waste. Obviously, this proposition applies with equal force to all the variant tenancies embraced within the general scope and title of joint estates—tenants in common—and all those sustaining the familiar attitude of landlord and tenant, mortgagor and mortgagee, fall within the prohibitions of the settled rules regarding waste and its incidents. Now it is very apparent that in the topical treatment of these various subjects, waste may appropriately form the theme of extended annotation and comment. But is it expedient or necessary, after having given in a separate chapter a logical and discriminating review of its nature, scope and incidents, to revamp the same old arguments, restate the same restrictive laws,—cite the same "formidable array of authority," and conclude with the same cautionary suggestions? True, we can inflate the volume of the text—gain some applausive utterance from the "able critic" for our "elaborate and scholarly treatment"—but the frigid and indubitable fact remains that we have merely reiterated former statements, and unconscionably padded an undertaking that at best is one of great magnitude, and imperatively demands the most concise statement consistent with intelligent exposition.

It is really astonishing to what extent a hearty dedication to these two simple formulas can abridge and compress the subject-matter. The attractions are all but irresistible to the literary enthusiasts to develop side issues, bury himself in the historical ooze that is everywhere around him, and trace the gradual evolution of this sublime science of the law from the time of the Roman praetors, and the medieval scholastics, on through the latter convulsions of feudalism and the period of the common-law ascendancy, to the present hour. Still others, infatuated with Sir Henry Maine and Mr. Hallam, must display their profundity and erudition in long Latin excerpts from Glanville, Littleton and the late lamented Mr. Coke. It is an evidence of scholarship too alluring to be successfully resisted, and in consequence, our legal text-books are quite apt to become the mere repositories of mouldy learning that only tends to bewilder and exasperate. When we yearn for ancient history, feel an insatiable and unquenchable longing for its assuagements and benefactions, we are conceited enough to believe that we know where to find them. But we are moved to remark that it should not be, within the pages of a legal text-book that aims at an exposition of the modern law, tributary to a great subject.

To the very flattering reception accorded to my previous efforts in legal literature, the present volume is chiefly due. An author easily persuades himself that the public is friendly to his efforts. And when that persuasion is supplemented by a most generous and even lavish patronage, it is apt to result in a partial justification for future attempts. While this work, doubtless, has its imperfections, both of style and treatment, it is believed that it will favorably compare with any work of similar compass now before the public. It is submitted to the intelligent criticism of the legal profession to whose indulgence the author already owes so much.

SPRINGFIELD, MASS., *January 1st*, 1897.

FRANK S. RICE.

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REAL PROPERTY.

CHAPTER I.

NATURE OF REAL PROPERTY.

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§ 1. **Definition of real property.**—Old Bracton — a legist and institutional writer of some celebrity — seems to have been familiar with the now well-known classification of “property” by which we designate it as “real” or “personal.”

As a justiciary of the thirteenth century, an Oxonian of high repute, and as a Doctor of Laws, who spent a lifetime in codification, we may at least presume his familiarity with the technical learning of his day, and quiet a quarrel of long standing by reminding the respective disputants that it is a matter of small consequence here or hereafter when the subdivision took place, or by whom it was first suggested. Certain it is that for centuries the English speaking race has cherished the distinction, and among them and us, all property is and always has been either "real" or "personal."

Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land.
4. That which is immovable by law.

Land is the solid material of the earth, whatever may be the ingredients of which it is composed; whether soil, rock, or other substance.

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another.

Every kind of property that is not real is personal. Cal. Civil Code, sec. 657 et seq.

"Property," it will be observed, is a term of wide significance; it may embrace everything that is the subject of ownership as restricted in its application to land; it denotes every species of title vested in absolute ownership or inchoate; it embraces rights that lie in contract, those which are executory as well as those which are executed.¹ So the mere possession of real property is constantly treated as property; it includes choses in action as well as those in

¹Soulard v. United States, 4 Pet. 512.

possession.² The term mixed property signifies such as has the dual characteristics of real estate and personalty, as, a leasehold.³

“Real property with us does not serve as the foundation for personal distinction or family grandeur, and is vested with no peculiar sanctity. Its uses are those of property simply. It is an article of commerce, and its free circulation is encouraged. Without going into details I insist that the law of real property in this country ought to be assimilated as nearly as possible to the law of personal property,

² Carlton v. Carton, 72 Me. 116; Hornsby v. United States, 10 Wall. 242.

³ 3 Bl. Com. 144. Property signifies “ownership;” “dominion;” the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. 1 Mackeld. Civ. Law, 269, sect. 259. It imports the exclusive right of using and disposing of a subject as one’s own. Bell’s Dict. Tayl. Civ. Law, 476. This is the strict legal sense of the word, as in the expressions “property in land,” “property in chattels.” Things are regarded in law not as property, but as the *objects* of property. 2 Bl. Com. 15. Property has been judicially defined as the right or interest which one has in lands or chattels. Tilghman, C. J., 6 Binney’s R. 94; Spencer, C. J., 17 Johns. R. 283; see 1 Comstock’s R. 20, 24; 3 Kernan’s R. 396. Blackstone says: The right of property is that sole and despotic dominion, which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. 2 Com. 2. The right of

property consists in the free use, enjoyment and disposal of all a person’s acquisitions, without any control or diminution, save only by the laws of the land. 1 Id. 138.

Property is the highest right a man can have to any thing; being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man’s courtesy. Spencer, Ch. J., 17 Johns. R. 281, 283. As applied to lands, the term includes every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed. Marshall, C. J., 4 Peters’ R. 512.

The interest which can be acquired in external objects or things is “property.” The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in or over them. This interest is “absolute” when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others; and “limited” or “qualified” when the control acquired

and that it is practicable to emancipate it from all the pernicious consequences of tenure, whether existing by the common law, or growing out of the doctrine of uses, and to make it as simple and as easily understood as the law concerning personalty. I do earnestly maintain that it is owing simply to the inertia and conservatism of our bar, that it is willing to let this great department of our law remain in its present condition — chaotic, uncertain, complex, and abounding in subtleties and refinements. Let us at length have deliverance from the remaining vestiges of the bondage of the Norman conqueror, and from the heavy burdens which a long succession of English Chancellors have imposed upon us." From Dillon's "Laws and Jurisprudence of England and America." Sec. 8.⁴

§ 2. Land and its incidents. The word land is a comprehensive term including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on; and all pass under the general description of land, in a deed. Standing trees must be regarded as part and parcel of the land in which they are rooted, and from which they draw their support; and upon the death of the ancestor, they pass to the

falls short of that. To entitle one to bring an action for an injury to any specific object or thing, he must have a property therein of one kind or the other. (Griffith v. Charlotte, etc. R. Co., 23 S. C. 38, Simpson, C. J.)

Anderson's Law Dict.

Blackstone makes "the free use, enjoyment and disposal" of one's own an essential element of property.

See also *Stevens v. State*, 2 Ark. 291, 35 Am. Dec. 74; *Millett v. People*, 117 Ill. 296; *Godcharles v. Wigeman*, 113 Pa. 431.

⁴Though the term real as applied to property, in distinction from personal, is now so familiar, it is one of a somewhat recent introduction. While the feudal law

prevailed, the terms of use in its stead were lands, tenements, and hereditaments; and these acquired the epithet of real, from the nature of the remedy applied by law, for the recovery of them, as distinguished from that provided in case of injuries, contracts broken, and the like. In the one case, the claimant or demandant recovered the real thing sued for — the land itself — while ordinarily, in the other, he could only recover recompense in the form of pecuniary damage. The term, as a means of designation, did not come into general use until after the feudal system had lost its hold; nor till even as late as the commencement of the 17th century. *Bouvier Law Dict.* title, Real Prop.

heir as a part of the inheritance, and not to the executor as emblements or as chattels.⁵

Lord Coke says that the word land, in its legal signification, comprehends any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes, and heath; it also legally includes all houses and other buildings standing thereon.⁶

The attributes of permanency and immovability are among those that most conspicuously distinguish real from personal property, although other distinctions are constantly recognized — as for instance — the method of its alienation, which must be by deed, and its peculiar descendible qualities, which, on the death of the owner intestate, inexorably demand the investiture of the title in the heir, to the utter exclusion of the administrator or executor. It is a term co-extensive and interchangeable with that of real estate, and both import either corporeal or incorporeal interests in lands, tenements, and hereditaments.

The word land includes not only the soil, but everything attached to it; whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings, and fences. This is but common learning, and there is no more room for question, that a grant of land, *eo nomine*, will carry buildings and fences, than there is that it will carry growing trees and herbage upon, or mines and quarries in, the ground.⁷

“In its more limited sense, the term land denotes the quantity and character of the interest or estate which the tenant may own in lands.” “When used to describe the quantity of the estate, ‘land’ is understood to denote a freehold estate at least.”⁸

Philosophically it seems more correct to say that the word land means, in law, as in the vernacular, the soil or portion of the earth's crust; and to explain or justify such expressions as that, whoever owns the buildings above, and the minerals below, upon the view, not that these are within the

⁵ Kingsley v. Holbrook, 45 N. H.

⁷ Mott v. Palmer, 1 N. Y. 564.

319.

⁸ Johnson v. Richardson, 33 Miss.

⁶ 1 Inst. 4, a. Cruise Dig. 1 (Ed. 464.
1808.)

extension of the term land, but that they are so connected with it, that by rules of law, they pass by a conveyance of the land. This view makes land, as a term, narrower, in its signification, than realty, though it would allow an instrument, speaking of land, to operate co-extensively with one granting "realty" or "real property" by either of those terms.⁹

"The English law of land is of a mixed origin. The customs of the early Teutonic invaders; the inevitable effect of conquest and settlement of the land on a large scale; the gradual and what may be called the natural growth of feudal ideas; the effect of the Norman Conquest in developing these ideas into a system of law and imparting doctrines unknown before; the subsequent influence of the Roman and Canon law, all these are elements of which account must be taken in attempting to trace the growth of the law of land."¹⁰

"Of all subjects of property," says Lord Kaimes, "land is that which engages our affections the most, and for this reason the relation of property respecting land grew up much sooner to its present firmness and stability, than the relation of property respecting movables."¹¹

There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of any other individual in the universe.¹²

§ 3. The term "Real Estate" defined. The term real estate embraces not only lands, but all improvements of a permanent character placed upon land. These are regarded as a part of the land. In the case of *Dooley v. Crist*, 25 Ill. 556, the court held that when a stranger constructs a building upon the land of another, without his consent, it becomes a part of the land, and he will become a trespasser by removing it. It is said in Hillard on Real Prop. Vol. I, p. 5, if one man erects buildings upon the land of another, voluntarily and without any contract, they become a part of the land, and the

⁹ 2 Abbott's Law Dict. 4.

¹⁰ Digby Hist. Law Real Prop.

¹¹ Tracts, p. 96.

¹² 2 Bl. Comm. 2.

former has no right to remove them. Such buildings are *prima facie* part of the realty.

The term includes every freehold estate and interest in lands; that is, an estate in fee or for life. This is understood to include every interest and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death of an intestate seized or possessed thereof, or in any manner entitled thereto, and except leases for years and estates for the life of another person. This is but an elaboration of the common law definition of the term.¹³

A remainder in fee in lands is clearly "real estate."

The words in legal signification include all interests in land, whether in possession, reversion, or remainder. They are used in the Statutes, as co-extensive in meaning with "lands, tenements and hereditaments."¹⁴

In New York, the term "real estate" has been declared by statute to be equivalent in meaning to "land," (1 R. S. [387], 379, sec. 2), and to "lands, tenements and hereditaments," (Id. [750], 141, sec. 10), and has been otherwise "construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seized or possessed thereof, or in any manner entitled thereto, and except leases for years, and estates for the life of another person."¹⁵

¹³ *Merry v. Hallett*, 2 Cow. 497.

¹⁴ *Floyd v. Carow*, 88 N. Y. 560.

¹⁵ Tenement signifies a thing which is the subject of tenure. *Pond v. Bergh*, 10 Paige, 157; *Shep. Touch*, 91. In legal import it is everything that may be holden. It is of much greater significance than the term "land" or houses "and buildings" or "messuage," although in popular apprehension there is a tendency to so limit it. But a personal hereditament such as an annuity, is not a tenement. In modern usage it may mean or de-

note a room or suite of rooms in a dwelling house. *Commonwealth v. Hersey*, 144 Mass. 298.

The term hereditaments is quite as extended in its significance as the term property itself. They are usually designated as corporeal and incorporeal, a classification which, as subsequently appears, has been considered as particularly unfortunate. Corporeal hereditaments consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither

§ 4. Classified as corporeal and incorporeal hereditaments.

From the medieval times in which Glanville wrote, real property has been characterized either as corporeal or incorporeal. By the term corporeal such property is meant as is of a substantial and permanent character, and the term land may briefly designate what is generally known as corporeal property, always assuming that the term embraces such permanent erections as may be found upon it. Incorporeal property consists chiefly in rights and privileges arising out of land. Rents and easements may be regarded as ordinary instances of incorporeal property. Cruise says:

“Corporeal property consists wholly of substantial, permanent objects which may be comprehended under the general denomination land. Incorporeal property consists of rights and profits arising from or annexed to land. Land has also, in its legal signification, an indefinite extent, upwards as well as downwards. For it is a maxim of law that, *cujus est solum, ejus est usque ad coelum*, and downwards, whatever is in a direct line between the surface and the center of the earth, such as mines of metal and other fossils, is the property of the owner of the surface.”¹⁶

§ 5. Views of Mr. Digby on this classification. Mr. Digby, in his History of the Law of Real Property, 2d edition, page 270, note, vigorously objects to this classification. He says: “The division of hereditaments into corporeal and incorporeal, though deeply rooted in our legal phraseology, is most unfortunate and misleading. The confusion is inherited from the Roman lawyers (see Justinian, Inst. ii. tit. 2), but has been made worse confounded by our own authorities. Following the Romans, our lawyers distinguished between hereditaments as meaning the actual corporeal land itself, and another kind of hereditaments as not being the land itself but ‘the rights annexed to or issuing out of the land.’ A

be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be

comprehended under the general denomination of land only. Bl. Com. Book 2, Ch. 2.

¹⁶Cruise Dig. 4; Pusey v. Pusey, 1 Vern. 273.

moment's reflection is sufficient to show that the distinction is untenable. The lawyer has nothing whatever to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between different classes of rights, and not between land on the one side and rights on the other, that he is concerned with. In such phrases as 'the land descends to the heir,' what is meant is, not that something happens to the land itself, but that a particular class of the ancestor's rights in relation to the land descends to the heir. The names 'corporeal and incorporeal' are most unfortunate, because if by 'corporeal' is meant 'relating to land,' then a large class of incorporeal hereditaments are also entitled to the name; if by 'incorporeal' is meant that they are mere rights, then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights. In reality, however, it appears that the names point to different classes of rights; and in fact, Stephen, in his edition of Blackstone (5th ed., vol. i. p. 656), almost confines incorporeal hereditaments to *jura in alieno solo*." (Austin Jurisp. ii. 707, 708.)

§ 6. Water and ice as real property. It is well settled that, under some conditions, water and ice are to be regarded as real estate, belonging to the owner of the land which is beneath it.¹⁷

And, when that is the case, the landowner or his assign has the exclusive right to gather and dispose of the ice for his own benefit, subject to the rights of other riparian owners.¹⁸

In Iowa the owner of land has the right to use so much of the water of a stream flowing over it as is necessary to supply what are termed his "natural wants."¹⁹

Where he does not own the soil under the stream, as where it is meandered, and his ownership does not include its bed, he has no exclusive right to the ice which forms in it.²⁰

In such cases, whoever has lawful access to the stream may

¹⁷ See *State v. Pottmeyer*, 33 Ind. 402; 5 Am. Rep. 224, and cases therein cited; 9 Am. & Eng. Encyclop. Law, 853.

¹⁸ See *Bigelow v. Shaw*, 65 Mich. 341, and cases therein cited.

¹⁹ *Spence v. McDonough*, 77 Iowa, 461; *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576.

²⁰ *Serrin v. Grefe*, 67 Iowa, 197.

use the water and the ice which forms therein in such manner as does not interfere with the rights of the riparian owners.²¹

§ 7. **Heirlooms.** The immense display of learning on the subject of heirlooms — so frequently met with in the English adjudications — is, with us, entirely useless, except as a reminder of the extreme length to which our ancestors pursued a right in the form of a phantom. At best the law in the mother country, relating to the subject, was based on mere custom. Why swans and doves, rabbits and pet squirrels, old ancestral paintings, or an antique horn should be regarded as “real estate” in this country is an unrevealed mystery. I have been entirely unable to discover any direct adjudications upon the subject on this side of the Atlantic, and certainly, no court would care to converge upon itself the dubious attention of bench, bar, and commentator, by solemnly declaring that such property as we have last enumerated should pass to the heir as real estate. Indeed, Mr. Anderson says, as a subordinate definition of the word heirlooms, that they are properly portraits, coats of arms, paintings, and such like of the former owners of an inheritance. (Citing Brown’s Law Dict.) In a subsequent paragraph he declares that heirlooms are not recognized by the laws of this country, and cites in support of his averment 1 Wash. R. P. 4th ed. 20, and Moseley’s Est. W. N. C. Professor Walker also appears as a sceptic on the question of their recognition with us, and in my opinion the word should be banished from the vocabulary of real property as one that an American student has nothing whatever to do with.²²

²¹ Brown v. Cunningham, 82 Iowa, 515; 12 L. R. A. 583.

²² The term heirlooms is often applied in practice to certain chattels — for example, pictures, plate, or furniture — which are directed by will or settlement to follow the limitations thereby made of some family mansion or estate. But the word is not here employed in its strict and proper sense, nor is the

disposition itself, beyond a certain point, effectual; for the articles will, in such case, belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate; and, if he die intestate, will pass to his personal representative, and not to his heir. Co. Litt. 18b–185b; 2 Steph. Com. bk. 2, pt. 2; Wharton,

§ 8. **Crops and Trees.** So a crop of corn fully matured but standing uncut in the field, passes by deed with the freehold. (*Tripp v. Hasceig*, 20 Mich. 254.) In *Kitteredge v. Woods*, 3 N. H. 503, Judge Ritchardson maintains the proposition that when the land is conveyed without any reservation, whatever crop is upon the land passes, and after stating that ripe grain in the field is subject to execution as a chattel, his Honor adds: "Yet no doubt seems ever to have been entertained that it passes with the land when sold without any reservation." And in the case of *Heavilon v. Heavilon*, 29 Ind. 509, the court expressly admits that until severance, the crop, as between vendor and purchaser of the land, is part of the realty. The authorities are quite decisive that whether the crop of the seller goes with the land to the purchaser when there is no reservation or exception, depends upon whether the crop is at the time attached to the soil, and not upon its condition as to maturity. And this seems to be the most natural and practical rule. When parties are bargaining about land, the slightest observation will discover whether the crops are severed or not, and there will be no room for question or mistake as to whether they belong to the land or not, if owned by the vendor. If, however, the crops are to be considered as land or personal chattels, as they continue, or do not continue, to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point."

It was stated by Judge Metcalf, in *Stearns v. Washburn*, 7 Gray, 188, that, until severed, grass was not personalty, nor goods or chattels, but was part of the realty."

In *Branton v. Griffiths*, 2 C. P. Div. 212, the court said: "Now it is impossible that there can be present delivery of growing crops. In a popular and practical sense, growing crops are no more capable of removal than the land itself. I do not know that corn growing is susceptible of delivery in any other way than by putting the donee into possession of the soil." Per Chief Justice Kent, in *Noble v. Smith*, 2 Johns.

³³ *Tripp v. Hasceig*, supra, op. by 562; *Raventas v. Green*, 57 Cal. Graves J. 254; *Stowe v. Peacock*, 35 Me.

³⁴ *Searles v. Ogden*, 15 Reporter, 385.

52, 56; *Smith v. Champney*, 50 Iowa, 174. There are, however, cases which hold that the possession is in the vendee until he is prepared to harvest the crops, and until then he is not required to take manual possession of them.²⁵

Mr. Benjamin thus sums up the law on the subject perfectly, and what he declares, is good law everywhere, except as to sales of young growing timber.²⁶

"Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the fourth section of the Statute of Frauds."²⁷

"Growing crops, if *fructus naturales*, are part of the soil before severance, and an agreement therefore, vesting an interest in them in the purchaser before severance is governed by the fourth section; (Lord Coleridge, C. J., in *Marshall v. Green*, 1 C. P. Div. 38-40; *Slocum v. Seymour*, 7 Vroom, 138) but if the interest is not to be vested until they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the seventeenth and not by the fourth section of the Statute of Frauds."²⁸

The case of *Marshall v. Green* must be viewed with considerable suspicion. The American cases are not all in harmony, but the tendency is toward the doctrine that the Statute of Frauds applies. Such sales involve an interest in land, and if resting in oral agreement merely, they are voidable.²⁹

Growing wheat sown by the owner of the soil is a part of the realty until ripe and ready to sever from the soil, and

²⁵ *Ticknor v. McClelland*, 84 Ill. 471; *Williamson v. Steele*, 3 Lea (Tenn.), 527.

²⁶ Benjamin on Sales (4th Am. ed.), sec. 126.

²⁷ *Kingsley v. Holbrook*, 45 N. H. 313, 318; *Buck v. Pickwell*, 27 Vt. 157; *Bryant v. Crosby*, 40 Me. 9; *Sherry v. Picken*, 10 Ind. 375; Bull

v. Griswold, 19 Ill. 631; *Ross v. Welch*, 11 Gray, 235.

²⁸ See Benjamin on Sales (4th Am. ed.), p. 147, note.

²⁹ *Green v. Armstrong*, 1 Den. 550; *O'Donnell v. Brehen*, 36 N. J. L. 257; *Howe v. Batchelder*, 49 N. H. 204; *Kilmore v. Howlett*, 48 N. Y. 569.

therefore is not subject to attachment as personality. In support of this proposition, Washb. Real Prop. 2d ed., p. 4; *Burleigh v. Piper*, 51 Iowa, 649, and *Ellithorpe v. Reidesil*, 71 Iowa, 315, are cited. The last of these authorities, which is a case decided by the Supreme Court of Iowa, fully sustains this contention; and it is said in the opinion: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such; but while they remained immature, and were being matured by the soil, they were attached to and constituted part of the realty; they could no more be levied on and sold on execution as personality than could the trees growing upon the premises. This doctrine is elementary, and it has frequently been declared by this court."³⁰

It must be conceded that there is much force in the reasoning to sustain this position. It is a well-established rule that a conveyance of land, either by voluntary deed or judicial sale without reservation, carries all growing crops with the title to the land.³¹

The value of the growing crop depends upon the soil for its support and nourishment, and if disconnected at once, in a case like this, would be nothing. A levy and sale usually affords but little return to the creditor, while it is a serious loss oftentimes to the debtor; but, whatever may be our individual views as to the policy of the law, we must be governed by it as we find it. In the case of *Beckman v. Sikes*, 35 Kan. 120, it was held that a sale under a mortgage foreclosure carried to the purchaser growing crops planted after the decree of foreclosure was entered as against a purchaser, who bought from the mortgagor the growing crop one day before the sale by the sheriff. In the opinion the court says: "The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop, knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any

³⁰ Downard v. Groff, 40 Iowa, 597; *Burleigh v. Piper*, 51 Iowa, 650; *Hecht v. Dettman*, 56 Iowa, 679; *Martin v. Knapp*, 57 Iowa, 336.

³¹ *Garanflo v. Cooley*, 33 Kan. 137; *Smith v. Hague*, 25 Kan. 246; *Chapman v. Veach*, 32 Kan. 167.

one who purchased said crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation, or waiver of the right to the crop, at such sale the title to the same would pass with the land." *Goodwin v. Smith*, 49 Kan. 351, holds: "The purchaser at a judicial sale of mortgaged premises is entitled to the growing crop of wheat on the land against the tenant of the mortgagor, who took a lease of the land after a suit for foreclosure had been commenced, and planted the wheat after judgment had been rendered in the foreclosure action; the purchaser having acquired a sheriff's deed on the 2d day of February, and the wheat not ripening and being ready for harvesting until the 20th day of June."³²

In *Caldwell v. Alsop*, 48 Kan. 571, 782, "an owner of mortgaged land leased the same to another, and reserved as rent a share of the crop. He was in default in the payment of the mortgage, and insolvent. After default was made, and after the leasing of the premises, but before the rent was due, he sold his share of the crop rent to one who had notice of the mortgage and of the default. After the crop had fully matured, but while it was standing upon the land, foreclosure proceedings were begun, and a receiver of the land appointed, but the court refused to authorize the receiver to take possession of the crop. Held, that the order of refusal was not error."

Trees standing and growing on a division line are common property, as to which the owners of adjoining parcels of land are tenants in common; and an action of trespass will lie by the one against the other who attempts to cut down and destroy them without the consent of his co-tenant.³³

If the trees have special value and one of the co-tenants derives from them some special advantage, benefit or enjoyment, beyond the actual value of trees as trees, courts of

³² See, also, *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57. 337; *Griffin v. Bixby*, 12 N. H. 454; *DuBois v. Beaver*, 25 N. Y.

³³ *Hoffman v. Armstrong*, 46 Barb. 123.

equity will not hesitate to interfere by injunction to restrain his co-tenant from cutting down and destroying the same and depriving him of the special value, benefit and enjoyment which he enjoys therefrom.³⁴

Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other and derive nourishment therefrom, it was considered by Allen J., in giving the opinion of the court in *Dubois v. Beaver*, 25 N. Y. Rep. 123, etc., that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v. Pollie*, 2 Rol. Rep. 141; *Holder v. Coates*, 1 Moody & Malkin, 112.

The ground or reason assigned in these cases for holding that the owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates.

The adjacent owner may cut off the branches or roots of trees up to the line of his land; but, if he use them, he will be obliged to pay the owner of the tree what they are worth.

Where a tree stands upon the boundary line between adjoining owners, so that its body extends into the land of each, they own the tree and fruit in common, and neither is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property.³⁵

But in *White v. Foster*, 102 Mass. 375-379, Judge Colt said: "A simple oral contract for the sale of trees, to be removed in a definite time, would be construed as not intended to convey any interest in the land."

And in *Clafin v. Carpenter*, 4 Met. 580, Judge Wilde said: "A contract for sale of standing timber, to be cut and severed from the freehold by the vendee, does not convey to him any interest in land within the meaning of the statute. Such a

³⁴ 2 Story Eq. Jur. sec. 928; 8 Pom. Eq. Jur. sec. 1357; *Sarles v. Sarles*, 3 Sandf. Ch. 601, 7 L. ed. 772; *Daubenspeck v. Grear*, 18 Cal. 443; *Wilson v. Mineral Point*, 39

Wis. 160; *Shipley v. Ritter*, 7 Md. 408.

³⁵ *Griffin v. Bixby*, 12 N. H. 454; *Dubois v. Beaver*, 25 N. Y. 123; *Austin Farm Law*, 170.

contract is to be construed as passing an interest in trees when they are severed from the freehold, and not any interest in the land."³⁶

§ 9. Mines and minerals. Bouvier defines a mine as an excavation made for obtaining minerals from the bowels of the earth; and the minerals themselves are known by the name of mine. Mines are considered as open and not open. An open mine is one at which work has been done, and a part of the materials taken out. When land is let on which there is an open mine, the tenant may, unless restricted by his lease, work the mine (1 Cru. Dig. 132; 5 Co. R. 12; 1 Chit. Pr. 184, 5); and he may open new pits or shafts for working the old vein, for otherwise the working of the same mine might be impracticable. (2 P. Wms. 388; 3 Tho. Co. Litt. 237; 10 Pick, R. 460.) A mine not opened cannot be operated by a tenant for years unless authorized, nor even by a tenant for life, without being guilty of waste.³⁷ Unless expressly excepted, mines would be included in the conveyance of land, without being expressly named, and so vice versa, by a grant of a mine, the land itself, the surface above the mine, if delivery be made, will pass.³⁸

Bainbridge on the Law of Mines and Minerals, at page 129, says: "When mines form part of the general inheritance, they will, of course, be transferred along with lands, without being expressly mentioned in the conveyance; but when they form a distinct possession or inheritance, a distinct title to them must also be established. In the latter situation the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made."

Taking out mineral is a natural use of mining property,

³⁶ *Nettleton v. Sikes*, 8 Met. 34; *Giles v. Simonds*, 15 Gray 441; *Drake v. Wells*, 11 Allen, 141; *Poor v. Oakman*, 104 Mass. 309; *Erschine v. Plummer*, 7 Me. 447; *Cutler v. Pope*, 13 Me. 377.

³⁷ 5 Co. 12.

³⁸ Co. Litt. 6; 1 Tho. Co. Litt. 218;

Shep. To. 26. Vide, generally, 15 Vin. Abb. 401; 2 Supp. to Ves. jr. 257, and the cases there cited, and 448; Com. Dig. Grant, G 7; Id. Waifs, H 1; Crabb, R. P. secs. 98-101; 10 East, 273; 1 M. & S. 84; 2 B. & A. 554; 4 Watts, 223-246; Bouvier's Law Dict. 165.

and no adjoining proprietor can complain of the result of careful, proper mining operations, and the cases have decided that where the maxim *sic utere tuo ut alienum non laedas* is applied to land and property, it is subject to a certain modification; it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. * * The right to mine coal is not a nuisance in itself. It is a right incident to ownership of property, but should be exercised in the ordinary manner, and with due care.

Distinct ownerships may, however, exist as to the surface lands, and the different stratifications of mineral deposit beneath the surface. Each proprietor must exercise his rights in due subordination to those of the other owners. For instance, the particular owner of the surface must allow free access to and from the shaft or tunnel which extends to the mineral deposits of another proprietor, and both of these must respect and countenance the rights of a third proprietor who has acquired dominion over the oil or gas underlying the coal strata. His rights allow him to pass through the coal stratification with a drill or tubing, to properly encase the same, and to make repairs thereto when injured. So the proprietor of the surface may require the mineral proprietor to so develop his mine as not to endanger the natural surface grade. In other words, the law accords impartial respect to every individual right, and will not tolerate the least unnecessary infringement of one upon the other.³⁹

a. *Coal in place.* Coal in place on land is a part of the land, but the coal may be sold or leased to be mined and removed and paid for by the ton after it is taken out and cleaned. In such cases the subject of the sale ceases to be a part of the real estate and becomes personal property, and the rights of the parties depend upon the contract alone.⁴⁰

³⁹ Horner v. Watson, 79 Pa. St. 242; Wilms v. Jess, 94 Ill. 464; Marvin v. Brewster I. N. Co. 55 N. Y. 538; Green v. Putnam, 8 Cush. 21; Jones v. Wagner, 66 P. St. 429;

Yandes v. Wright, 66 Ind. 319; Adams v. Briggs, 7 Cush. 361.

⁴⁰ Douglass v. Shunway, 13 Gray, 502; Claflin v. Carpenter, 4 Met. 580; 38 Am. Dec. 381; Smith v.

b. *Aerolites as realty*. In the American and English Encyclopedia of Law (vol. 15, p. 388), is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian upon the highway who is first to discover such a stone is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Soc.*, 16 Alb. L. J. 76, and 13 Ir. L. T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of Accretions. In 20 Alb. L. J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meager to indicate the trend of legal thought.

The Supreme Court of Iowa, with some doubts as to the correctness of its decision decided, that an aerolite, falling upon the earth, becomes the property of the owner of the land upon which it falls, and the mere fact that a stranger has discovered it, does not alter the question as to who is its legal owner.⁴¹

There is a great deal, however, to be said on the other side. Scientists inform us that between six and seven hundred of these strangers come to our earth every year. Their chief value is for scientific purposes, and as museum curios. Their legal status as a matter of ownership is what concerns us, and there is much reason for holding that the principle

Suriman, 9 Barn & C. 561; Marshall v. Green, L. R. 1 C. P. Div. 35; Mumford v. Whitney, 15 Wend. 380; 30 Am. Dec. 60; Drake v. Wells, 11 Allen, 141; Nettleton v. Sikes, 8 Met. 34; Byassee v. Reese, 4 Met. (Ky.), 372; 83 Am. Dec. 481; Erskine v. Plummer, 7 Me. 447; 22 Am. Dec. 216; Cain v. McGuire, 13 B. Mon. 340; Edwards v. Grand Trunk R. Co. of Canada, 54 Me.

105; Giles v. Simonds, 15 Gray, 441; 77 Am. Dec. 373; Bostwick v. Leach, 3 Day, 484; Smith v. Benson, 1 Hill, 176; Am. Lead. Cas. (4th Am ed.), 739, 752; Buck v. Pickwell, 27 Vt. 157; Sugd. Vend. & P. Perkin's ed. note n, pp. 125, 126; Union Petroleum Co. v. Bliven Petroleum Co. 72 Pa. 173.

⁴¹ Goddard v. Winchell, — Iowa, — p. (1892).

applicable to such a case is that of original acquisition. 20 Albany L. J. 299.

Under the Roman law, when treasure was found by one person on the land of another, one-half thereof was given to the finder and other half went to the owner of the land. Code Civil Act, 713; Mackenzie, Roman Law, 170; cited in *Livermore v. White*, 74 Me. 452; 43 Am. Rep. 600.

But in English and American law the finder of property not claimed by an owner is entitled to the whole of it, even though it be found on the land of another.

The finder of lost articles acquires a good title to them, against every one except the former owner.⁴²

The place in which a lost article is found does not constitute any exception to the general rule of law that the finder is entitled to it as against all persons except the owner.⁴³

The authorities regard such lost articles as things fallen back into the common stock, and purely upon the ground of prior occupancy is the finder's title made to rest.⁴⁴

Practically the same rule is held regarding things abandoned. They fall back into the "common stock" and are the property of him who first possesses himself of them.⁴⁵

As to things which were never owned, which have never yet been out of the "common stock and mass of things," the same rule holds in the main, and the person who first captures the chattel may hold it against the world.⁴⁶

We shall not indulge ourselves in any pangs of mental parturition over Judge Granger's refusal to recognize the theory that the Iowa meteorite "was supposed to have been abandoned by the last proprietor," but we may note, as he does, the trend of the argument of the counsel for the appellant to the effect that all real estate is acquired by the rules

⁴² *Armory v. Delamirie*, 1 Strange, 505.

⁴³ *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424; *Durfee v. Jones*, 11 R. I. 588; 23 Am. Rep. 528; *Bowen v. Sullivan*, 62 Ind. 281; 30 Am. Rep. 172; *Hamaker v. Blanchard*, 90 Pa. 377; 35 Am. Rep. 664; *Totum v. Sharpless*, 6 Phila. 18.

⁴⁴ 2 Bl. Com. sec. 402; cases above cited; *Sovern v. Yorlan*, 16 Or. 269.

⁴⁵ *Haslem v. Lockwood*, 37 Conn. 500; 9 Am. Rep. 350.

⁴⁶ *Taber v. Jenny*, 1 Sprague, 315; *Young v. Hichens*, 1 Dav. & Meriv. 592; *Amory v. Flynn*, 10 Johns. 102; 6 Am Dec. 316.

of the common law either by escheat, occupancy, prescription, forfeiture, or some species of alienation. These were all the methods known, barring inheritance. We are entirely at a loss to determine any other method of acquiring realty, and are very much gratified to know that the court itself was in grave doubt as to the correctness of its ruling. Indeed, it is admitted that the question has been decided by the French courts in favor of regarding an aerolite as personal property.

c. *Oil and gas.* The authorities now very generally hold petroleum to be a mineral, and as much a part of the realty as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration, as in the case of salt water, etc.⁴⁷

The courts of the State of Pennsylvania have had many cases, some involving property rights of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as property in general. "Oil is a mineral, and, being a mineral, is part of the realty."⁴⁸

In this it is like coal, or any other natural product, which *in situ* forms part of the land. It may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription; as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of an estate.⁴⁹

⁴⁷ Kier v. Peterson, 41 Pa. St. 362.

⁴⁸ Funk v. Haldeman (1866), 53 Pa. St. 229, 249.

⁴⁹ Stoughton's App. (1878), 88 Pa. 198, 201; Westmoreland & C. Nat. Gas Co. v. DeWitt, 130 Pa. 235; 5 L. R. A. 731; Hague v. Wheeler, 157 Pa. 324; 22 L. R. A. 141. As to ownership *in situ* of subterranean

waters, see Collins v. Chartiers Valley Gas Co. (1890), 131 Pa. 143; 6 L. R. A. 280; as to ownership by different ones of the surface, coal, iron, ore, oil, gas, etc., see Chartiers Block Coal Co. v. Mellon (1893); 152 Pa. 286, 293; 18 L. R. A. 702; Wheatley v. Baugh, 25 Pa. 528; 64 Am. Dec. 721, where there is a full note on the subject.

"Where percolating water is found, it belongs to the realty where it is found."⁶⁰

In *Findlay v. Smith* (1818), 6 Munf. 134; 8 Am. Dec. 733, subterranean salt water is treated as part of the inheritance of which waste could be committed. And for a like or a stronger reason should rock oil be so regarded.⁶¹

I do not understand the case of *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 211; 57 Am. Rep. 659, to lay down a different doctrine, even as to natural gas, so long as it is confined in the strata where it is found. It is only when it escapes out of the possession of the owner that the right of property is gone. This follows as an inevitable result of its fugitive nature.

The description of property rights in respect to gas is very clearly made in *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 130 Pa. St. 235. In this case the master said: "Gas is a mineral, and while *in situ* is a part of the land, and, therefore, possession of the land is possession of the gas." But after quoting this the court said: "This deduction must be made with some qualifications. Gas, it is true, is a mineral, but it is a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than the mere decision. Water also is a mineral, but the decisions in ordinary cases of mining, etc., have never been as unqualified precedents in regard to flowing or even to percolating water. Water, and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals and unlike other minerals, they have the power and tendency to escape without the volition of the owner; their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148. They belong to the owner of the land and are part of it so long as they are on or in it, and are subject to his control; but when they escape or go into other land or come under another's control, the title of the former owner

⁶⁰ *Chasemore v. Richards*, 7 H. L. Cas. 349.

⁶¹ *Hail v. Reed*, 15 B. Mon. 479.

is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even distant owner drills his own land, or taps your gas so that it comes into his well or under his control, it is no longer yours but his."

They belong to the owner of the land, and are part of it so long as they are on or in it, and are subject to his control. But when they escape and go into other land, or come under another's control, the title of the former owner is gone."

HOUSES, BUILDINGS, WATER MAINS, PIPES, ELECTRIC WIRES, FRAME OF ELEVATED R. R. ETC

§ 10. Buildings regarded as real estate. It is familiar learning that whatever is firmly affixed to the soil is a part of it, and will be included in the term real estate. Every day illustrations of the rule occur in the constant reference to houses, stores, buildings of all descriptions, as real property. And such erections invariably pass with a conveyance of the land on which they stand, unless owing to some peculiarity of the erection, and some express reservation relating thereto, a particular structure is regarded as personal property."

As a general rule, buildings⁶² are a part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of the realty, unless there is an agreement by

⁶² *Westmoreland N. Gas. Co. v. DeWitt*, 130 Pa. St. 235.

⁶³ 2 Bl. Com. 17; *Lipsky v. Borgmann*, 52 Wis. 256; *Coombs v. Jordan*, 2 Bland. Ch. 284; *Mott v. Palmer*, 1 N. Y. 564.

⁶⁴ Anderson says:—A building, in its broadest sense, an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. *Truesdell v. Gay*, 13 Gray, 312 (1859), *Bigelow*, C. J.

A structure of considerable size, intended to be permanent or at

least to endure for a considerable time. *Stevens v. Gourley*, 97 E. C. L. 112 (1859), *Byles J.*

The "commencement" of a building imports some work and labor on the ground, the effect of which is apparent, as, beginning to dig the foundation, or other work of like description, which every one can readily recognize as the commencement of a building. *Brooks v. Lester*, 36 Md. 70 (1872). Work being done with the purpose then formed to continue it to the completion of the building. *Kelly v. Rosenstock*, 45 Md. 392 (1876), cases. *Anderson's Law Dict.*

the owner of the land, either express or implied, from the relation of the parties, that they shall remain personal property.⁵⁵

a. *Water mains, pipes, etc.* Water mains, pipes, etc., may be considered real estate, so taxable where they are located, to the person or company owning them. The idea that they may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest.⁵⁶

The Iowa doctrine, that water works are real estate, and taxable as an entirety at the place of supply, is not supported by authority. *Oskaloosa Water Co. v. Oskaloosa Board of Equalization*, 84 Iowa, 407, and similarly the superstructure of an elevated railway is regarded as realty.⁵⁷

The reasoning will also apply to the poles of an electrical lighting plant or of a telegraph line.⁵⁸

b. *Different stories in a building may be realty.* Where one person owns the lower story of a building, and another the upper story, with right of way thereto, the latter cannot recover of the former for necessary repairs of the roof, made by him. Although this mode of ownership is not at all unusual in large cities, yet the common law does not clearly define the relative rights and duties of persons so situated. 2 Wash. on Real Est. 79; see *Loring v. Bacon*, 4 Mass. 575; *contra*, *Tenant v. Goldwin*, 2 Ld. Raym. 1091, where it is held that each may compel the other to repair. As a ruling that commends itself to even a crude notion of justice the Massachusetts decision in *Loring v. Bacon*, *supra*, is utterly indefensible.

Mr. Washburn says:⁵⁹ "One may have an estate in a single chamber in a dwelling house. (*Doe v. Burt*, 1 Tr. 701; *Proprietors v. Lovell*, 1 Met. 538; *Cheeseboro v. Green*, 10 Conn. 318; Co. Litt. 48b.; *Loring v. Bacon*, 4 Mass. 576; 1 Prest. Est. 214; *Humphries v. Brogden*, 12 Ad. & El. n. s. 747, 756;

⁵⁵ *Westgate v. Wixon*, 128 Mass. 304, 306.

⁵⁶ *Rex v. Bath*, 14 East., 610, and *Rex v. Brighton Gas Light & Coke Co.*, 5 Barn. & C. 466. See *Boston Mfg. Co. v. Newton*, 22 Pick. 22.

⁵⁷ *People, ex rel. N. Y. El. R. R. Co., v. Commissioners*, 82 N.Y. 459.

⁵⁸ *Keating Co. v. Marshall Co.*, 74 Tex. 605.

⁵⁹ 1 Real Prop., ch. I, § 12.

Rhodes v. McCormick, 4 Iowa, 375), and may have a seizin of such house or chamber, and maintain ejectment therefor, if deprived of its possession (*Doe v. Burt*, ub. sup.; *Otis v. Smith*, 9 Pick. 293), although if such house or chamber be destroyed, all interest of the owner thereof in the land on which it stood might thereby be lost.”⁶⁰

§ 11. **Pews and tombs in churches.** Church pews have been the subject of considerable controversy, in recent years, and the line of decisions in regard to the subject is anything but satisfactory. It may be assumed, however, that the parish, or the proprietors, may abandon their former place of worship, without infringing the rights of the pew-holders, even where, as a natural consequence, the pew is rendered useless, and it would seem that the fact that the church edifice was still in a tenable condition, does not alter the absence of liability. (*Fassett v. First Parish in Boylston*, 19 Pick. 361.) It seems that if “it has become necessary” to remove the church structure, the pew holders are powerless to prevent. But if the church is demolished or the pews removed merely as a matter of expediency, the pew-holder may recover.⁶¹

In the absence of any statute, pews in a church are held to be real estate. Such is the law in Maine and Connecticut; while in New Hampshire, Massachusetts and New York, they are held to be personal property. In Indiana they belong to the church. The property in a pew, whether the owner be a member of the society or not, is not absolute, but qualified and usufructuary—an exclusive right to occupy a certain part of the meeting-house for the purpose of attending public worship, and no other—and is necessarily subject to the right of the proper church authorities to remove, take down or repair the pew, although it is thereby destroyed.⁶²

A pew right is not of such a character as to prevent an absolute sale of the church edifice, either by contract or by

⁶⁰ *Stockwell v. Hunter*, 11 Met. 448.

⁶¹ *Howard v. First Parish in North Bridgewater*, 7 Pick. 138; *Kimball v. Second Parish in Rowley*, 24 Pick. 347; *Gorton v. Hadsell*, 9

Cush, 508; *Gay v. Baker*, 17 Mass. 435; *In re New South Meeting House*, 13 Allen, 497, 517.

⁶² *Daniel v. Wood*, 1 Pick. 102; *Austin, Farm Game Laws*, 96.

judicial process; by itself it was never known as a subject of taxation; if the edifice burns down the pew right is gone; it does not prevent the society from tearing down and rebuilding the edifice, or from altering the whole interior arrangement of it; it does not authorize the pew-holder to change and decorate the pew according to his fancy, or to cut it down and carry it away; and it gives him no right to the ground on which it stands.⁶³

"The right to a pew, although everywhere in Massachusetts it is regarded as property, and in every part of the State except Boston, as real estate (by St. 1855, c. 122, pews in all houses of public worship are made personal property), and in Boston as personal estate, yet it is property of a peculiar nature, derivative and dependent. It is an exclusive right to occupy a particular portion of a house of public worship, under certain restrictions. The owner of a pew is not a tenant in common of the estate on which the house stands; the legal estate is in the corporation, if the religious society be one, or in the trustees, if the property be vested in them to the use of the congregation, forming a religious society for public worship. Whoever else, therefore, may be, or claim to be, *cestuis que trust*, the holders of pews are clearly entitled to stand in that relation. For whom then were these grantees constituted trustees? The answer is, for a body of individuals who had united together and contributed of their means to purchase land and erect a house of public worship — a body of individuals as capable at that time of being designated, ascertained and identified as proof, as if they had been actually enumerated in the deed."⁶⁴

"The parish corporation is the legal owner of the house and the land on which it stood. It had the control of the house, the right to determine at what hours on the Sabbath and at other times it should be open for public worship; to select the pastor; to contract with him as to the terms of his settle-

⁶³ Church v. Wells, 24 Pa. 250; Kincaid's App., 66 Pa. 412; Craig v. First Presby. Church of Pittsburgh, 88 Pa. 51, 32 Am. Rep. 417; Philadelphia & R. R. Co. v. Reading & P. R. Co., 31 W. N. C. 187;

Hancock v. McAvoy, 31 W. N. C. 257.

⁶⁴ Attorney-General v. Proprietors of the Meeting-house in Federal Street in Boston, Mass.; 3 Gray, 1

ment; to determine who should be admitted to the pulpit in his absence, and to see that the house should be kept in a proper condition for its public use. The pew-holder has certain privileges by reason of his ownership — such as passing through the aisles, being addressed from the pulpit, etc. His property is not absolute but qualified. He may own a pew and yet not be a member of the parish corporation. The corporation may own the land and building thereon, while the pew-holder has only a qualified property in his pew.’’⁶⁵

It is within the power of the parish or the proprietors to determine whether to take down a church or to make alterations and repairs. The pew-holder cannot prevent them from doing this. The parish or the proprietors are the owners of the soil, and they may determine all matters relative to the structure to be maintained thereon.’’⁶⁶

Nevertheless the right of the pew-holder is held to be of such a nature that he is entitled to an indemnity if the parish or the proprietors exercise their right to take down the church when it is in such a condition that its demolition is not actually necessary. If it has become necessary to take down a meeting-house — that is to say, if a meeting-house has become so old and ruinous that its future use is not practicable — the parish or proprietors need not make payment to a pew-holder for the removal of his pew. But if a meeting-house is taken down as a matter of expediency, the pew-holders are entitled to payment. This rule has been so often stated and maintained that it must be taken to be the settled law of this commonwealth however the law may be elsewhere.’’⁶⁷

It is obvious that if, for any reason, the place of public worship has been changed so that religious services are no longer held in the church which was formerly used for that purpose,

⁶⁵ First Baptist Society v. Grant, 59 Me. 250.

⁶⁶ Daniel v. Wood, 1 Pick. 102, 11 Am. Dec. 151; Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 159; Re New South Meeting-house in Boston, 13 Allen, 497, 507.

⁶⁷ Howard v. First Parish in North Bridgewater, 7 Pick. 138; Kimball, v. Second Cong. Parish in Rowley, 24 Pick. 347, 349; Gorton v. Hadsell, 9 Cush. 508; Wentworth v. First Parish in Canton, 3 Pick, 344.

the value of the pew is much diminished; but when such change has been merely made from reasons of expediency, the parish or proprietors cannot go on and demolish the pew without making compensation to the owner of it. He still has an existing right, which may not be very valuable, but which, nevertheless, is entitled to recognition under the laws.

The fee of the land and the use of the pews are placed on a different footing. The former may be transferred, because such transfer is not forbidden and is not inconsistent with either the purpose or the condition of the conveyance. If the pews are disposed of, the condition is violated, the grant becomes void, and the land reverts as provided. The interest in the pew is separate from the fee, and the owner of the former may maintain an action against a trespasser or any person who infringes upon his rights, and they may be leased and held distinct from the fee.⁶⁸

So long as pews are considered in point of law as real estate, we can perceive no reason why the actual form of action, given by the common law, to redress a wrong done to the right of possession of real estate, is not the legal and proper remedy.⁶⁹

In the case of *Freligh v. Platt*, 5 Cow. (N. Y.), 494, the court say: "A sale of real estate *ex vi termini* means an absolute transfer of the property. But the sale of pews in a church is not a sale of real estate within the New York Act regulating religious societies. By the grant of a pew the grantee acquires a limited usufructuary right only. He must use it as a pew in a house of worship, but has not an unlimited, absolute right. He cannot use it lawfully for purposes incompatible with its nature. The right too, is limited as to time."

Whether, in the event of failure to dispose of it by will, a pew passes to the owner's heirs, or to his executor or administrator, depends upon the question whether, by the law of the State, pew rights are real or personal property. In Connecticut, Louisiana and Maine, pews are realty, and descend

⁶⁸ *Woodworth v. Payne*, 74 N. Y. 200.

⁶⁹ *Jackson v. Rounseville*, 5 Met. (Mass.), 132.

to the heir-at-law; in Massachusetts and New Hampshire — in most of the States — they are personalty, and, unless disposed of by will, vest in the administrator or the executor.⁷⁰

Mr. Wait says: "The owner or holder of a pew may bring trespass if he is disturbed in the possession (*Shaw v. Beveridge*, 3 Hill, [N. Y.], 26), even against the society or person in whom the title to the land and building is vested." But he cannot maintain trespass for the mere breaking and entry of the meeting-house in which his pew is situated."⁷²

Owners of tombs in the church edifice of a religious body have likewise no title in the land, but merely an interest in the structures and in their proper use, and they cannot prevent a sale of the land and building by the society, nor the removal of the remains from the tombs, when such removal, in other respects, is conducted according to law.⁷³

Sepulture in churchyards and private cemeteries belonging to churches, though paid for, never created or implied any right or title to the land. It is merely a privilege to be used in the mode permitted by the religious society.⁷⁴

The individual has only a right, exclusive of any other person, to bury upon the subdivided plat assigned to him. He holds a position analagous to that of a pew-holder in a house of public worship.⁷⁵

The right of burial is in the nature of an easement in the land, and every purchaser of a burial lot does so with the full knowledge and implied understanding, that change of circumstances may, in time, require a change of location, and that the law looking to such exigency authorizes the Cemetery Corporation to sell the soil in absolute fee, discharged of all easements.⁷⁶

⁷⁰ See Strong, Relations of Civil Law to Church Polity, &c., 126-32 (1875); Washb. Easem. 515; Craig v. First Presby. Church, 88 Pa. 51 (1878); Jones v. Towne, 58 N. H. 464 (1878), cases; Livingston v. Rector of Trinity Church, 45 N. J. L. 232-37 (1883), cases; Anderson's Law Dict.

⁷¹ O'Hear v. DeGoesbriand, 33 Vt. 593.

⁷² How v. Stevens, 47 Vt. 262.

⁷³ Schier v. Trinity Church, 109 Mass. 1; 2 Wait's Ac. & Def. 261.

⁷⁴ Pitkin v. L. I. R. R., 2 Barb. Ch. 230; Mumford v. Whitney, 15 Wend. 380; Wolf v. Frost, 2 Sandf. Ch. 72.

⁷⁵ Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 505.

⁷⁶ Richards v. Northwest Church, 32 Barb. 42.

It is an easement even where the deed purports to convey a *fee*, but equity will protect all rights that are not inconsistent with those of the society or with public health and safety.

§ 12. **Manure, etc., as realty.** In this country, in some of the States, it has been held that the manure made on the leasehold premises during the tenant's term, is his property, which he has the right to remove or sell, and which may be attached and holden as his property for the payment of his debts.⁷⁷

In others, it is held that in the absence of special agreement, or a special custom, the rules of good husbandry require that the manure made upon a farm, in the ordinary course, should be expended upon it; that such manure is an incident of the freehold, and belongs to the landlord, subject to the right of the tenant to use it in the cultivation of the land; and that the tenant has no right to remove or dispose of it, or to apply it to any other use, either during or after the expiration of his tenancy.⁷⁸

Chief Justice Shaw in *Daniels v. Pond*, 21 Pick. 371, said: "Manure made on a farm occupied by a tenant at will or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barnyard, or of composts formed by an admixture of these with soil or other substances, is, by usage, practice, and the general understanding, so attached to and connected with the realty, that, in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, from which the landlord may have redress; and such sale will vest no property in the vendee."⁷⁹

The tenant, of course, has a qualified possession of the manure, for the purpose of using it on the farm; but a sale by him vests the right of possession in the landlord.⁷⁹

⁷⁷ *Staples v. Emery*, 7 Greenl. 201; *Southwick v. Ellison*, 2 Iredell, 326.

⁷⁸ *Wetherbee v. Ellison*, 19 Vt. (4 Wash.), 379; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Lassell v. Reed*,

6 Greenl. 222; *Daniel v. Pond*, 21 Pick. 371, to which add Kent's opinion, 2 Com. 347, n. a.

⁷⁹ *Middlebrook v. Corwin*, 15 Wend. 169; *Lassell v. Reed*, 6 Greenl. 222.

"Where manure is made in a livery stable," says Judge Sargent (*Corey v. Bishop*, 48 N. H. 146), "or in any manner not connected with agriculture, the tenant of the livery stable, or the person thus making manure upon land of another, owns the manure entirely distinct from the real estate, and has the right to remove it or dispose of it as he pleases, by parol or bill of sale, as of any other chattel or personal property."

A learned judge, Eastman J. in *Plumer v. Plumer*, 30 N. H. 558, in New Hampshire, states the law as follows: "It must be regarded as settled in this State that, as between grantor and grantee, all manure made in the ordinary course of carrying on the farm, and which is upon the premises at the time of the sale and conveyance, will pass to the grantee as an incident to the land conveyed, unless there be a reservation in the deed; and that it makes no difference whether it be in the field, or in the yard, or in heaps at the windows, or under cover. It is an incident and appurtenance to the land, and passes with it, like the fallen timber and trees, the loose stones lying upon the surface of the earth, and like the wood and stone fences erected upon the land, and the materials of such fences when placed upon the ground for use or accidentally fallen down."

But in New Jersey (*Ruckman v. Outwater*, 4 Dutch. 581), it is held to be personal property and not to pass with the real estate as an incident, or part of it.

Manure made upon a farm is personal property, and may be seized and sold upon execution.⁸⁰ So wheat or corn growing is a chattel, and may be sold on execution.⁸¹ Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed (2 Kent. 346), or by statute. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. (*Goodrich v. Jones*, 2 Hill, 142.) Hop-poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop

⁸⁰ *Staples v. Emery*, 7 Greenl. 201.

⁸¹ *Whipple v. Tool*, 2 Johns. 419.

and piled in the yard, with the intention of being replaced in the season of hop raising, are part of the real estate."⁸²

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks Richardson, C. J., in *Kittredge v. Wood*, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation."

With regard to the manure, as between landlord and tenant, it belongs to the former; in other words, it belongs to the farm whereon it is made. This is in respect to the benefit of the farm, and the common course of husbandry. The manure makes a part of the freehold.⁸³ Nay, though it be laid up in heaps in the farm yard.⁸⁴ The rule has always been still stronger in favor of the vendee as against the vendor, and heir as against the executor. In *Kittredge v. Woods*, 3 N. H. Rep. 503, it was accordingly decided, that manure lying in a barnyard passes to the vendee. Vide, also, *Daniels v. Pond*, before cited.

The case of *Kittredge v. Woods*, was very well considered; and the right of the vendee to the manure, whether in heaps or scattered in the barnyard, vindicated on principle and authority I think quite satisfactorily.

There are several English dicta which conflict with our views of the right to manure, as between landlord and tenant, and that of the court in New Hampshire, as between vendor and vendee.⁸⁵

Manure which had accumulated in a public street, the fee of which belonged to the borough, was raked into heaps by the plaintiff during the evening of one day, to be removed the next evening. In this he was prevented by the defendant, who carted the manure away to his own land. In an

⁸² Bishop v. Bishop, 1 Kenan, 123.

⁸³ Middlebrook v. Corwin, 15 Wend. 169.

⁸⁴ Lassell v. Reed, 6 Greenl. 222; Daniels v. Pond, 21 Pick. 367; see Staples v. Emery, 7 Greenl. 203.

⁸⁵ And vide 2 Kent's Com. 346, note c, 4th ed., and Carver v. Pierce, Sty. 66. But they may all be considered as repudiated by Middlebrook v. Corwin. Vide the introductory remarks of Mr. Justice Nelson, 15 Wend. 170.

action of trover by the plaintiff for the value of the manure, it was held that the manure was personalty; that it belonged originally to the owners of the animals that dropped it, but was to be regarded as abandoned by such owners; that the first occupant had a right to appropriate it; that after the plaintiff had added to its value by the labor of raking it into heaps he was entitled to it; and that he had a reasonable time in which to remove it.⁸⁶

§ 13. **Doctrine of equitable conversion examined.** It is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be done, as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted.⁸⁷

Courts of equity frequently regard that as done which ought to be done, and say where land is directed to be sold and converted into money, or money is directed to be invested in land, that for certain purposes the property will be considered of that character or species into which it is directed to be converted. But it would be a fundamental error to assume that this court held that the real estate actually became personal property, and might be treated as such for all purposes. The land is still real estate. Its physical character has not been changed, and it is subject to the rules and principles governing the disposition of real estate, and must be sold and conveyed as such.

⁸⁶ Haslem v. Lockwood, 37 Conn. 500, 505 (1871), cases; Anderson's Law Dict.

⁸⁷ Attorney-General v. Hubbock, L. R. 13 Q. B. Div. 275, 289. See, also, Ford v. Ford, 70 Wis. 19, 46; 5 Am. St. Rep. 534; Haward v. Peavey, 128 Ill. 430; 15 Am. St. Rep. 120; Ford v. Ford, 80 Mich. 42; Keller v. Harper, 64 Md. 74; Greenland v. Waddell, 116 N. Y. 234; 15 Am. St. Rep. 400; Hobson v. Hale, 95 N. Y. 588; Dodge v.

Williams, 46 Wis. 97; Carr v. Branch, 85 Va. 597; Effinger v. Hall, 81 Va. 91, 107; Phillips v. Ferguson, 85 Va. 509, 511; De Vaughan v. McLeroy, 82 Ga. 687; Forsyth v. Forsyth, 46 N. J. Eq. 400; Craig v. Leslie, 3 Wheat. 577; Peter v. Beverly, 10 Pet. 532; Taylor v. Benham, 5 How. 233; Notes to Fletcher v. Ashburner. 1 Lead. Cas. Eq. 968; Phillips v. Ferguson, 85 Va. 507; 17 Am. St. Rep. 78.

The rule has been thus stated by the Supreme Court of the United States: "It is undoubtedly the established doctrine that when a will directs conversion of the realty only for certain purposes, which are limited — for example, for the payment for particular legacies — and follows the direction of a bequest of the residue of personal estate, the conversion takes place only so far as the proceeds of the sale are needed to pay the legacies prior to the residuary one, and the gift of the personalty will not carry the produce of the sale of the lands in the absence of a contrary intent plainly manifested. The surplus or excess retains the quality of realty, and is transmitted by a devise of the realty, if there be one, or descends under the intestate laws. Hence it is often a question, and frequently a difficult one, whether the direction to sell was for a limited purpose or for all purposes, and consequently whether the testator's intent was to impress upon all the proceeds the quality of personalty."⁸⁸

It is incumbent upon the court to consider the real property of the testator as converted into money under a full power of sale entrusted to the executor, if by so doing it can best effectuate the testamentary intent.⁸⁹

This doctrine of conversion necessarily affects partnerships; partnership property is that which is held by the partners as such for the purposes of the partnership; it is held for the purpose of carrying on the adventure of the partnership, and may be wanted for that purpose; and, moreover, at the time of the winding up of the partnership the debts of the partnership will have to be paid, the question of their amount settled between the partners, and the unexhausted assets divided between them. The partnership property must thus be treated in the end as subject to a trust for sale, and therefore it is personal property.⁹⁰

In this case in the court below (L. R. 10, Q. B. Div. 188), the court cited with approval the following from *Darby v. Darby*, 3 Drew. 495, as a correct statement of the rule of the court with regard to the conversion of partnership property,

⁸⁸ *Given v. Hilton*, 95 U. S. 591, 596.

8 Paige, 104; *Lent v. Howard*, 8 N. Y. 169.

⁸⁹ *Van Vechten v. Van Vechten*,

⁹⁰ *Attorney-General v. Hubbuck*, L. R. 13 Q. B. Div. 275, 289.

in the absence of any binding agreement between the parties to the contrary: "Irrespective of authority and looking at the matter with reference to principles well established in this court, if partners purchase land merely for the purpose of their partnership, and pay for it out of the partnership property, that transaction makes the property personalty and effects a conversion out and out. What is the clear principle of this court as to the law of partnership? It is that, on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation; it is inherent in the very contract of partnership."

Upon the question whether the character of property can be changed by agreement from realty to personalty as against a bona fide purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.⁹¹

In *Haven v. Emery*, 33 N. H. 66, 68, 69, the plaintiffs delivered iron rails to a railway company under an agreement written that the title should remain in the plaintiffs until they were paid. The defendants were mortgagees of the road. In the opinion the court says: "As between the parties to the contract, the intention is plain that the property should not vest in the road until the iron was paid for, and that intention will prevail between the parties, unless the laying of the rails in the track necessarily made them an intrinsic and inseparable part of the road in spite of the

⁹¹ *Hunt v. Bay State Iron Co.*, 97 Mass. 279, 283.

agreement which reserved the property in them to the plaintiffs. * * * The rails were laid, according to the provisions of the agreement, in a particular part of the track, and that part designated by a written certificate. There is, therefore, no difficulty in tracing and identifying the iron which the plaintiffs claim. It is not like a case where bricks or nails or other materials are used in the construction of a house, and so incorporated with the building that they cannot be separated and traced.⁹² We see nothing in the way in which the rails are annexed to the road, or in the manner in which they are used upon it, that incorporates them more essentially with the road than in the case of a house or fence set on land of another, with his assent, and under an agreement that the house or fence shall remain the personal property of the original owner. And a house built on land of another, or a fence set on his land, with his assent, and under an agreement that the house or fence shall remain the personal property of the party who places it on the land, does not become annexed in law to the land. The agreement of the parties in such case supersedes the general rule of the law. * * * As between the parties then, to this contract, we are of opinion that the rails remain the property of the complainants. Has the right of the complainants been divested or affected by the mortgage to the trustees for the bondholders? * * * There are some cases which might seem to carry the idea that a purchaser of land would be bound by an agreement of the seller, which gives to what would otherwise be part of the land, the character of personal property, and vested the title to it in another, though the purchaser had no notice of the agreement.⁹³ We are not yet prepared to acquiesce in such a doctrine. Primarily, and in the absence of notice to the contrary, the purchaser would seem to have a right to suppose that he was buying with all the incidents and appurtenances which the law, as a general rule, annexed to his purchase; and we should hesitate before we held that he could be affected by a private agreement not brought to his knowledge, which changed the natural and legal character of the property."

⁹² Cross v. Marston, 17 Vt. 540;
44 Am. Dec. 353.

⁹³ Mott v. Palmer, 1 N. Y. 564.

In *Cochran v. Flint*, 57 N. H. 514, 545, it was said that the consent of a conditional vendor of a saw-mill machinery that it should be affixed to real estate in such way that it would pass by a deed of the land if it belonged to the land-owner ought to be inferred from the nature of the thing and the ordinary mode of its use; but the inferred consent was held to be that it should be affixed to the mill of the conditional vendee, and not to a mill of a third person or a mill previously mortgaged to a third person. The view that a purchaser of land has a right to suppose he is buying with all the incidents and appurtenances which the law, as a general rule, annexes to his purchase, was apparently accepted in *Corey v. Bishop*, 48 N. H. 146, 150, was expressly approved in *Carroll v. McCullough*, 63 N. H. 95, 96; and was the basis of the decision in *Mott v. Palmer*, 1 N. Y. 564. But the question against whom this right operates is one on which the authorities are not agreed.

In the case of *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 497, the master of the rolls says that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds: "the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others.²⁴

The principle upon which the whole of this doctrine is founded, is that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will

²⁴ See *Dougherty v. Bull*, 2 P. 358; *Trelawney v. Booth*, 2 Atk. Wms. 320; *Yeates v. Compton*, Id. 307.

comprehend the cases which come under this head of equity.

Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elects to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in the case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of *Kirkham v. Mills*, 13 Ves., which was a devise of real estate to trustees upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A, B and C, the estate was, upon the death of A, B and C, considered and treated as personal property, notwithstanding the *cestui que trust*, after the death of the testator, had entered upon, and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion that the occupation of the land for two years was too short to presume an election. He adds: "The opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims had been much doubted by Lord Eldon, who held, that without some act, it must be

considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of *Edwards v. The Countess of Warwick*, 2 P. Wms. 171, which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remaining to his first and every other son in tail male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir-at-law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

The doctrine is well established by the cases which have been referred to, and by many others which it is unnecessary to mention.

a. *What must appear before doctrine is applied.* In Hunt's and Lehrman's Appeals, 105 Pa. St. 128, 141, it was said that the rule is well settled that in order to work a conversion there must be either (1) a positive direction to sell in order to execute the will; or (2) an absolute necessity to sell in order to execute the will; or (3) such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money. In each of the two latter cases an intent to convert will be implied.

"The question of conversion is one of intention, and the question is, did the testator intend to have his real estate converted into personalty immediately upon his death? If he did, a court of equity must give such intent effect, and treat the realty as personal property from that time. If, however, he intended to give the executor or trustee under his will a power to convert, leaving it discretionary with them to convert or not, the conversion will depend on the will or discretion of the executor or trustee, and will not be regarded as consummated in fact."

§ 14. **Definition and nature of fixtures.** Any text-writer who is covetous of distinction may employ his faculties upon the definition of a fixture and if he should, through rare dexterity and exceptional aptitude in expression, find himself in possession of a formula that will meet all the variant phases of our complex business and social relations the present writer will be the first to congratulate him upon his discovery. Heretofore our lexicographers have been singularly unfortunate in their attempts to please the judiciary in this respect, and it is extremely doubtful if a definition can be framed that will be regarded as satisfactory.

The term fixture as employed in real estate denotes a thing fixed in a greater or less degree to realty. (2 Kent, 343). As a rule, articles to become fixtures must either be fastened to the realty or to what is clearly a part of it, or they must be placed upon the land with a manifest intent that they shall permanently remain there, and should be peculiarly fitted to something that is actually fastened upon it and essential to its profitable enjoyment.⁹⁵

There is, however, no universal test for determining whether an article, personal in its nature, has acquired the character of realty. In each case regard is to be had to the nature of the chattel itself, the injury that would result from its removal and the intention in placing it upon the premises with reference to trade agriculture and ornament.⁹⁶

The cases, both English and American, present an endless diversity and positive contradiction on this subject of fixtures. It is utterly impossible to reconcile them. The deepest and the most evanescent ideas have found expression in the various reports and both natural genius and acquired expertness are baffled in the attempt to formulate some decisive and positive rule that will suffice for all emergencies. An inward persuasion has long been diffusing itself and now comes to utterance that the views expressed in the preceding paragraph embody the sentiments of the judicial mind regarding this vexed and incongruous topic.

⁹⁵ Farmers' Loan & Co. v. Hendrickson, 25 Barb. 489.

Coburn v. Litchfield, 132 Mass. 448; Anderson Law Dict., Tit. Fix-

⁹⁶ Thomas v. Davis, 76 Mo. 76; ture.

While some rules of general application have been formulated, the very nature of the subject must in some degree be controlled by the variant circumstances peculiar to it. The united application of three requisites is regarded as the true criterion of an immovable fixture. (1) Real or constructive annexation to the realty; (2) adaptation to the use or purpose of that part of the realty with which it is connected; (3) the manifest intent of the parties in making the annexation.⁹⁷

The diversities of trade and the development of manufactures have imperatively called for relaxation of the old common law rule relating to fixtures and other factors are controlling in determining this question, than those formerly employed. Where chattels are of such a character as to retain their identity and distinctive characteristics after the annexation, and do not become an essential part of the building so that their removal materially injures either the building or the chattels themselves, a mutual agreement as to how the chattels shall be regarded will have the effect to preserve the personal character of the chattels if the agreement mentioned is to that effect. As between the parties this view will prevail.⁹⁸ The execution of a chattel mortgage on machinery evidences an intention that the property shall retain its original character of a chattel.⁹⁹ Except where the rights of innocent purchasers are involved it is the policy of the law to uphold this view of the question in the interests of trade and manufacturing industry.

What constitutes a fixture, in a given case, is a question upon which the authorities are not agreed, and we shall not undertake the unprofitable task of attempting to reconcile or classify them. The trend of modern decisions is that, subject to the manner of annexation to the realty, and to the use and purposes of the realty, with which a thing in controversy is connected, its character as a fixture or not, is to be

⁹⁷ *Teaff v. Hewitt*, 1 Ohio St. 530; *McRea v. Central Natl. Bank*, 66 N. Y. 489; *Ewell on Fix.* 21; *Tyler on Fix.* 114.

⁹⁸ *Malett v. Price*, 109 Ind. 22;

Hendey v. Dinkerhoff, 57 Cal. 3; *Haeven v. Emery*, 33 N. H. 66.

⁹⁹ *Sisson v. Hibbard*, 75 N. Y. 542; *Eaves v. Estes*, 10 Kan. 314; *Jones, Chat. Mort. sec.* 125.

determined by the intention of the party making the annexation.¹⁰⁰

It is said in the case last cited that the intention is the controlling consideration in determining the whole question. The Iowa court has held that "fixtures are personal chattels annexed to the freehold, and which may be severed and removed by the party who has annexed them, against the will of the owner of the freehold."¹⁰¹

The subject of the rolling stock being a fixture to a railroad was discussed by the court of the United States, and held to be such, in technical language, "so far as in its nature and use it can be called a fixture." It is such, not upon any particular part of the road, but attaches to every part and portion. And the reporter has an extended note to the same case in which he learnedly discusses the question, "Is rolling stock a fixture?" He examines the general subject of the law of fixtures and "the conclusion is, that rolling stock put and used upon a railroad passes with a conveyance of the road, even without mention or specific description."¹⁰²

Gas fixtures whether in the form of chandeliers suspended from the ceiling or projected as brackets from a perpendicular wall, attached by screws or cemented to the gas pipe assume the nature of furniture and do not lose that character by reason of this method of fastening.¹⁰³ So a portable furnace is regarded as a stove and falls within the classification of a chattel.¹⁰⁴

A portable furnace may or may not be a part of the realty. Whether it is or not may be a question of law, or of fact, or a mixed question of law and fact. The test is usually one of intention as between landlord and tenant, grantor and grantee or mortgagor and mortgagee. But whatever it is this

¹⁰⁰ Ewell, Fixtures, 21; Tyler, Fixtures, 114; 1 Jones, Mort. sec. 429; Cobbey, Chat. Mort. sec. 204, 205; Teaff v. Hewitt, 1 Ohio St. 530, 59 Am. Dec. 634; Potter v. Cromwell, 40 N. Y. 296, 100 Am. Dec. 485; McRea v. Central Nat. Bank, 66 N. Y. 489; Binkley v. Forkner, 117 Ind. 176; Ottumna Woolen Mill Co. v.

Hawley, 44 Iowa, 57, 24 Am. Rep. 719.

¹⁰¹ Pickerell v. Carson, 8 Iowa, 551.

¹⁰² Minnesota Co. v. St. Paul Co., 2 Wallace, 644, 645-649.

¹⁰³ Guthrie v. Jones, 108 Mass. 191.

¹⁰⁴ McConnell v. Blood, 123 Mass. 47.

test is certainly not whether the part claimed as personalty can be removed without injury to what remains.¹⁰⁵

So it is settled that where one erects a building for a temporary purpose on another's land, with the owner's knowledge and consent, an agreement for the separate ownership of the building so erected may be implied from the circumstances and conduct of the parties. It is unnecessary to prove a contract in express terms in order to justify the conclusion that the owner of the fee is not the owner of the building.¹⁰⁶

Generally, we may assume that whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the purpose for which it was erected and permanently to enhance its value for the purpose of its erection, although its removal may be effected without injury to the main structure, may not be removed, as the law assumes that it has become a part of the realty and cannot be disconnected until after the payment of the mortgage.¹⁰⁷

The later Massachusetts decisions establish that machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil.¹⁰⁸

Whether in any case, buildings that are placed upon land become fixtures is a question of fact to be determined upon the evidence of that particular case. The mere erection of a building upon land does not necessarily make it a fixture (*Pennybecker v. McDougal*, 48 Cal. 160), and in order to determine whether it be a fixture depends upon various circumstances and relations connected with its being placed upon the land.¹⁰⁹

¹⁰⁵ *Allen v. Mooney*, 130 Mass. 155.

¹⁰⁶ *Dame v. Dame*, 38 N. H. 429; *Russell v. Richards*, 2 Fair, 271; *Madigan v. McCarthy*, 108 Mass. 376; *Aldrich v. Parsons*, 6 N. H. 555; *Curtiss v. Hoyt*, 19 Conn. 154; *Smith v. Benson*, 1 Hill, 176; *Osgood v. Howard*, 6 Greenf. 452; *Prince v. Case*, 10 Conn. 375.

¹⁰⁷ *Smith Paper Co. v. Servin*, 130 Mass. 511.

¹⁰⁸ *McConnell v. Blood*, 123 Mass. 47; *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21.

¹⁰⁹ *Lavenson v. Standard Soap Co.*, 80 Cal. 250.

The term "fixture" is used in different senses. Sometimes it is used in its general sense of a thing which is affixed to land.¹¹⁰ Sometimes it is used to designate a thing which can be severed from land after having been affixed to it. In this sense it is a term "denoting the very reverse of the name."¹¹¹ Less frequently it is used to designate a thing which cannot be removed after having been affixed to the land.¹¹² If not affixed to the land in any sense, its owner may remove it about with pleasure. The rule of the common law was that a thing was not to be deemed affixed to land unless fastened to it in some manner. And in *Pennybecker v. McDougal*, 48 Cal. 160, it was held that a cabin set on wooden blocks not attached to the soil was personal property. But the value of the cabin was only \$25.00, and it must have the characteristics, more or less, of a temporary structure."

In New York and other States the common rule was relaxed so as to include things permanently resting upon the soil, though not fastened thereto. Thus, in *Snadecker v. Warring*, 12 N. Y. 175, it was held that a statue resting upon a pedestal in front of a building was a part of the realty, the court saying: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement."¹¹³

The cases, both English and American, upon the subject of fixtures, are so thoroughly in conflict that any attempt to reconcile them or to draw from them any rules of general application as to what articles are or are not fixtures, as between heir and executor, landlord or tenant, or mortgagor and mortgagee, would be of more than doubtful success.¹¹⁴

There are many cases which hold that the true test of a fixture (or immovable article) is the adaptation of the article to the use or purpose to which the realty is appropriated, however slight its physical connection with it may be.¹¹⁵

¹¹⁰ *Merritt v. Judd*, 14 Cal. 63, 64.

¹¹¹ 1 Chitty Gen. Pr. 161.

¹¹² *Ewell*, Fixtures, p. and note.

¹¹³ And see *Strickland v. Parker*, 54 Me. 266; *Cavis v. Beckford*, 62 N. H. 229.

¹¹⁴ *Rapalje & Lawrence Law Dict.*, title Fixtures, p. 524.

¹¹⁵ *Farrar v. Stackpole*, 6 Me. 157, 19 Am. Dec. 201; *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 680.

Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, rules that actual annexation and adaptation to the purpose to which the realty is appropriated must both unite. These tests are so manifestly appropriate that they need no argument to commend them.

Other authorities add a third test to the two above mentioned, viz., the intention of the tenant in making the annexation.¹¹⁶

As to the first two tests — annexation and adaptation both confessedly exist in most cases. It is clear that the third test may exist also. A tenant who has rented a farm is under an implied obligation, even if the contract is silent on the subject, to conduct his farm operations according to the requirements of good husbandry, preserving the fixtures that he finds.¹¹⁷

Questions regarding fixtures ordinarily arise in controversies between landlord and tenant, mortgagor and mortgagee and heir and executors.

§ 15. Fixtures as between mortgagor and mortgagee, landlord and tenant. As between mortgagor and mortgagee, the former may remove that which is not a fixture, and was placed upon the ground after the mortgage was executed.¹¹⁸ And it is also settled that the landlord is under no obligation to pay the tenant for buildings erected on the demised premises. The common law rule is that all buildings become part of the freehold and the innovations upon this rule have extended no further than the right of removal while the tenant is in possession.¹¹⁹ If the rule that fixtures form part of the freehold were invariable it would have the effect of entitling every heir, devisee and reversioner of land to the fixtures left on the land by the ancestor, testator, or tenant for life, instead of passing to his personal representatives with his other chattels; it would also entitle every freeholder to all the fixtures set up by his tenants; but the rules are greatly relaxed as between landlord and tenant. Washburn very

¹¹⁶ 3 Dane Abr. 156; *Teaff v. Hewitt*, 1 Ohio St. 527, 59 Am. Dec. 648; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

¹¹⁷ *Lewis v. Jones*, 17 Pa. 262, 55

Am. Dec. 550; *Brown v. Crump*, 1 Marsh. 567.

¹¹⁸ *Cope v. Romeyne*, 4 McLean, 484.

¹¹⁹ *Kutter v. Smith*, 2 Wall. 497.

pertinently remarks: "Articles that may assume the character of realty or personalty according to the circumstances are 'fixtures'—things substantially affixed to the soil though in their nature removable. The old notion of physical attachment is, by some courts, regarded as exploded. Whether a structure is a fixture depends upon the nature and character of the act by which the structure is put in its place, the policy of the law connected with its purpose, and the intent of those concerned in the act. Other courts still hold that it is essential that the article should not only be annexed to the freehold, but that it should clearly appear that a permanent accession was intended."¹²⁰

In determining as between mortgagor and mortgagee whether or not things are fixtures, the same rule applies as between grantor and grantee, and a concise formula may be this, "give him all that was regarded as realty, when he accepted the security."¹²¹

As between landlord and tenant the court will indulge in great liberality toward the latter. The harshness of the old common law system has been very much relaxed, and modern judges are not only prone but absolutely certain to respect the tenant's claim and allow him to remove chattels which have been actually annexed to the realty, where it appears that such removal can be accomplished without special loss or damage to the freehold, and where the articles sought to be removed were bought by the tenant.¹²²

In the case last cited it was held that a house built by a tenant upon land primarily for the purpose of a dairy, and incidentally for a dwelling house for the family, did not pass with the land. The earlier authorities are reviewed in that case by Mr. Justice Story, and the conclusion reached, that whatever is affixed to the land by the lessee for the purpose

¹²⁰ Wash. R. P. 6-18; Stout v. Stoppel, 30 Minn. 58, and cases cited; Capen v. Peckham, 35 Conn. 93; Montague v. Dent, 10 Rich. (S. C.), 135.

¹²¹ McFadden v. Allen, 134 N. Y. 189.

¹²² Miller v. Plumb, 6 Cow. 665; Oregon R. & N. Co. v. Mosuer, 14

Or. 519; Wall v. Hinds, 70 Mass. 256; Seeger v. Pettit, 77 Pa. St. 437; Johnson v. Wiseman, 4 Met. 360; Gaffield v. Hapgood, 34 Mass. 192; Pennybecker v. McDougal, 48 Cal. 160; Stokoe v. Upton, 40 Mich. 581; Torrey v. Burnett, 38 N. J. 457; Van Ness v. Packard, 27 U. S. 137.

of trade, whether it be made of brick or wood, is removable at the end of the term. Indeed, it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term. In the case of *Wagner v. Cleveland and T. R. Co.*, 22 Ohio St. 563, it was held that stone piers built by a railroad company as part of its road on lands over which it had acquired the right of way, did not, though firmly imbedded in the earth, become the property of the owner of the land, as part of the realty; and that, upon the abandonment of the road, the company might remove such structures as personal property.

So in *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347, it was held that the rails fastened to the road bed of a railroad, as well as the depots and other buildings, might, under certain circumstances, be treated as trade fixtures, and removable by the company, if the surrounding circumstances showed that at the time the rails were laid upon the land it was not intended that they should be merged in the freehold.

In *Loughran v. Ross*, 45 N. Y. 792, it was held that, if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous.¹²³

Many things which as between landlord and tenant are considered as chattels and as such removable, become, as between mortgagor and mortgagee, a part of the realty. Whatever is placed in the building by the mortgagor to carry out the obvious purposes for which it was erected, or to permanently increase its value for occupation, becomes a part of the realty, though not so fastened that it cannot be removed without serious injury to the building or to the thing itself.¹²⁴

¹²³ See also *Abell v. Williams*, 3 ed.), sec. 552; 2 *Smith's Lead. Cas.* Daly, 17; *Merritt v. Judd*, 14 Cal. (7th Am. ed.), 228, 245, 257.
¹²⁴ *McConnell v. Blood*, 124 Mass. 59; *Jungerman v. Bovee*, 19 Cal. 49.
 354; *Elwes v. Maw*, 3 East. 38; *Taylor on Landlord and Tenant* (5th

§ 16. **Trade fixtures.** The cases as to trade fixtures are innumerable, and apparently not all reconcilable on principle. Many of them turn on special contracts. The decisions are affected by the relationship of the parties, as between executors and heirs, mortgagor and mortgagee, purchaser and seller, landlord and tenant, etc. Some turn on the mode of annexation while that is ignored by others.

A review of all the cases *pro* and *con*, would be impracticable and unprofitable. Many of them concern the relation of the owners of land, onto which tenants brought something not to improve the land but to carry on their business. Such was the leading case of *Elwes v. Maw*, 3 East. 38. That case was approved by the Supreme Court of the United States in *Van Ness v. Packard*, 27 U. S. 2 Pet. 137; 7 L. Ed. 374, and in *Carr v. Georgia R. Co.*, 74 Ga. 74, where a brick depot was (*obiter*) said to be removable under certain circumstances.

A railroad is real estate, including its roadbed, rails, ties in track, depots, tanks, etc.¹²⁶

The general rule appears well settled that trade fixtures become annexed to the realty but the tenant may remove them during his term, and, if he fails to do so, he cannot afterwards assert a right in the property as against the owner of the land.¹²⁶ This rule may be regarded as always in the ascendancy where the term is of a certain period and there is no certain stipulation in the lease regarding the ultimate ownership of the fixtures. But if the lease is for an uncertain time as where a party is a tenant for life, or at will, fixtures are removable by the tenant within a reasonable period after the termination of the lease. We detect a disposition on the part of the courts to extend this rule and allow the tenant to remove his fixtures at any time after the expiration of the lease regardless of the character of the tenancy provided he is still in possession at the time of the removal.¹²⁷

¹²⁶ Northern Cent. R. Co. v. Canton Co., 30 Md. 347; Hunt v. Bay State Iron Co., 97 Mass. 283; Hart v. Benton, Bellefontaine R. Co., 7 Mo. App. 446; Union Trust Co. v. Weber, 96 Ill. 346.

¹²⁶ Bliss v. Whitney, 9 Allen, 114; Minshall v. Lloyd, 2 M. & W. 450.

¹²⁷ Penton v. Robert, 2 East. 88.

An article does not cease to be a trade fixture because, in order to be removed it must be taken to pieces.¹²⁸ Usually in determining whether an addition is removable or not the chief element to be considered is the manner of its annexation and whether it can be removed without substantial injury to the premises. The intent of the parties, while important, is of secondary consideration.¹²⁹

The case of *Kutter v. Smith*, 2 Wall, 491, appears to recognize a restricted rule, though without any extended discussion of the rule. Certainly, on principle the court should refrain from extending the right of removal so far as to include a thing which cannot be separated from the realty without the utter destruction of the thing removed, in other words, without being reduced to a mass of raw material in no way recognizable as the thing removed.¹³⁰

As to the distinction between structures, etc., erected by a tenant for use in his own trade and which may not be useful to a succeeding tenant, whose business may be different, the rule is stated to be that if equally adapted to the use of every succeeding tenant of the property they become part of the freehold and are not removable; they are fixtures.¹³¹

If the fixtures have been put there in lieu of others already used by former tenants, they are the landlord's property.¹³²

§ 17. Removal of fixtures by tenant after the expiration of his term. A tenant in possession under a lease which does not provide that he may remove his fixtures and improvements, cannot, after he has surrendered possession to his landlord, re-enter and remove his fixtures. (Taylor L. & T. § 551; Wood L. & T. § 532; *Ericson v. Jones*, 37 Minn. 459.) And the modern cases are inclined to restrict the removal of fixtures and improvements erected by him to those — and

¹²⁸ *Dostal v. McCaddon*, 35 Ia. 318; *Watriss v. Cambridge National Bank*, 124 Mass. 571; *Moore v. Wood*, 12 Abb. Pr. 393; *Penton v. Robert*, 2 East. 88; *Davis v. Moss*, 38 Pa. St. 346.

¹²⁹ *Hanrahan v. O'Riley*, 102 Mass. 201; *Amos & Farrard on Fixtures* (3d ed.), 7, 65.

¹³⁰ See *Ford v. Cobb*, 20 N. Y. 344; *Ex parte Bentley*, 2 M. D. & DeG. 591.

¹³¹ *Hill*, *Fixtures*, secs. 22-24; *Hoyle v. Plattsburgh & M. R. Co.*, 51 Barb. 62; *Brown*, *Fixtures*, sec. 18.

¹³² *Whiting v. Brastow*, 4 Pick. 310.

those only — which will not materially injure the premises by the process of removal or put them in a worse condition than he found them.¹³³

Against this doctrine Judge Cooley enters a vigorous protest (*Kerr v. Kingsbury*, 39 Mich. 150; s. c. 33 Am. Rep. 362, 364), saying among other things, "The requirements that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy for the protection of the landlord, and which is, that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time he has a right to regard himself as occupying in the character of a tenant."¹³⁴

The right of a tenant for years and of a life tenant to remove fixtures erected by the tenant within his term has been much discussed, but generally not very satisfactorily. But we are relieved of the necessity of an extended discussion of it by the researches and able consideration and discussion of the identical question by Chancellor Cooper in the case of *Cannon v. Hare*, 1 Tenn. Ch. 22, in which he said: "The law of fixtures, particularly in the form of actual buildings, seems to be in a distressing state of uncertainty." And after a full and satisfactory review of the text-writers, and the leading cases upon this subject, he thus sums up his conclusions: "(1) That the general rule is that everything affixed to the freehold passes with the freehold, and that the rigor of this rule is only relaxed in exceptional cases; (2) that this general rule will prevail, even between landlord and tenant for years, unless the circumstances are such as to

¹³³ *Lamphere v. Low*, 3 Neb. 131; s. c., 6 Rev. Rep. 376; *Weeton v. Whiting v. Brastow*, 4 Pick. 311. *Woodcock*, 7 Mees. & W. 14.

¹³⁴ *Penton v. Robart*, 2 East. 88;

create an exception; (3) that an exception does exist in favor of tenant for years in the case of buildings erected principally for the purpose of trade, or in the nature of trade, or out buildings not attached to the soil; (4) that no exception exists in favor of such tenant, where the buildings are erected for use principally as dwelling houses, or with a view of adding to the yearly income; (5) that it is doubtful how far a tenant for life is entitled to the exceptions in favor of a tenant for years, but it is certain that the rule of exceptions as to him is of more limited range; (6) that the decisions of late years lay little stress upon the mode of attachment to the soil, and more upon the relation of the parties, the intention with which the buildings are erected and the uses to which they are put."¹³⁶

§ 18. Tests by which the character is determined. It is extremely difficult to establish any general test by which a fixture may be in all instances determined. The exigencies of modern trade and industry have necessitated a wide departure from the early decisions and mere annexation is no longer regarded as determining the question. The intent is considered. Its peculiar adaptation to the use with which it is connected, and the effect of its removal.¹³⁶ Machines may remain chattels, and as such may be mortgaged, even though physically attached to the realty, if it sufficiently appears that the method of annexation was designed to steady the mechanism while in operation and thus give effective impulse to its use. In other words, the use, nature and character of the annexation must be considered.¹³⁷

First, last and always the intention of the parties in making the annexation is of great importance in determining this question of what constitutes a fixture. In all of its aspects it is a matter of great delicacy to reach a satisfactory determination.¹³⁸

¹³⁶ See *McDavid v. Wood*, 5 Heisk, 95.

¹³⁶ *Dudley v. Creighton*, 67 Md. 44; *Tillman v. DeLacy*, 80 Ala. 103.

¹³⁷ *Rogers v. Plattville Mfg. Co.* 81 Ala. 483; *Farmers' Loan & T.*

Co. v. Minneapolis Engine and Machine Works, 35 Minn. 543.

¹³⁸ *Penn Mutual Life Ins. Co. v. Semple*, 38 N. J. Eq. 575; *Foote v. Gooch*, 96 N. C. 265.

The criterion for determining whether property ordinarily regarded as personal becomes annexed to and part of the realty, is the union of three requisites:

First, Actual annexation to the realty or something appurtenant thereto.

Second, Application to the use or purpose to which that part of the realty with which it is connected is appropriated.

Third, The intention of the party making the annexation to make a permanent accession to the freehold.¹³⁹ This criterion was adopted by the Chancellor in *Quimby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260, and by the Court of Appeals of New York in *McRae v. Central Nat. Bank*, 66 N. Y. 489.

Whether a chattel is a fixture or not depends upon the facts. The mere intention of the parties to make it part of the freehold does not make it a fixture. To accomplish that result there must be an actual annexation to the freehold, though the strength of the union is not material, if in fact it be annexed. The intent of the party affixing it is only important on the question whether he intended to make the chattel so annexed a temporary or permanent accession to the freehold.¹⁴⁰ Cases of what is called constructive annexation are only apparent exceptions to this rule. The instances of constructive annexation such as the keys, doors and windows of a house removed for a temporary purpose, a mill-stone taken out of the mill to be picked, and saws and leather belting taken out to be repaired or laid aside for future use, and the like, are all cases where the chattel, by actual annexation, was once part of the realty and had been detached for temporary purposes without the intent to sever it from the freehold. Having once been part of the realty, removal temporarily without intent to sever permanently does not reconvert the chattel into personalty, and destroy its character as a fixture. (Ewell on Fixtures, 43.) This is all that is meant by constructive annexation. Cases of this description do not militate against the rule that actual annexation is the condition upon which a chattel in the first instance becomes part of the realty; and while the degree of

¹³⁹ *Teaff v. Hewitt*, 1 Ohio St. 511. 497; s. c., sub. nom., *Blancke v.*

¹⁴⁰ *Rogers v. Brokaw*, 10 C. E. Gr. Rogers, supra.

annexation is unimportant, it will be found that the attachment to the realty is invariably such as to give a fixedness in location or localization in use.

In the States of New York, Ohio, Iowa, and in other jurisdictions, the courts have established the following general rules as a criterion by which to determine whether an immovable fixture is personal property or real estate:

1. Real or constructive annexation of the article in question to the freehold.
2. Appropriation or adaption to the use or purpose of that part of the realty with which it is connected.
3. The intention of the party making the annexation to make the article a permanent accession to the freehold.¹⁴¹

Another test made by the cases is that where the fixture is not accessory to the land or realty, but accessory to a trade, which is the principal thing, then it is removable.

That distinction is well stated in *Fortman v. Geopper*, 14 Ohio St. 566, by the court as follows: "The principle to be kept in view underlying all questions of this kind is the distinction between the business which is carried on in or upon the premises and the premises or *locus quo*. The former is personal in its nature, and articles which are merely accessory to the business and have been put on the premises for this purpose and not as accessory to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient."

To the like effect we quote from Brown's Law of Fixtures, section 18, as follows:

"Having regard in each case to the nature of the principal subject matter, all such additions to it as partake of its nature, and, in consequence of that similarity of character, readily unite with it, are *prima facie* to be regarded as becoming instantly, upon their union with it, part and parcel with it, subject only to the one qualification that they are not of an extravagant, unnecessary or temporary character. * * * It becomes, in all cases, a preliminary, and indeed an indis-

¹⁴¹ See *Teaff v. Hewitt*, 1 Ohio St. 530, 59 Am. Dec. 634; *Potter v. Cromwell*, 40 N.Y. 296, 100 Am. Dec. 485; *McRea v. Central Nat. Bank*

of Troy, 66 N. Y. 489; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 59, 24 Am. Rep. 719.

pensable step in determining whether and by whom a particular fixture is removable, to first ascertain the proper and distinctive character of the *res principalis* itself.

Tyler, on page 101 of his Treatise on Fixtures, says: "The simple criterion of physical annexation is so limited in its range, and so productive of contradiction, that it will not apply with much force except in respect to fixtures in dwellings," and in Meigs Appeal, 62 Pa. 28, it is said: "In determining what is a fixture the notion of physical attachment is exploded, it is now determined by the character of the act by which the structure is put in its place, the policy of the law connected with its purpose, and the intention of those concerned. This Pennsylvania case lays down the law more broadly, than that of some other courts, yet it shows the tendency of modern decisions. (See, also, Ewell on Fixtures, 20, 293.) The test of whether real estate is benefited by the annexation has been repeatedly applied by the courts to determine whether the chattel annexed became a fixture or not."¹⁴²

§ 19. Effect of agreement. The contractual relation between parties may lawfully extend and embrace any conceivable subject and it is entirely competent for the parties at any time to enter into an agreement as to whether articles, originally of a chattel nature, shall be deemed fixtures, or vice versa. Such stipulations will be upheld and enforced.¹⁴³

¹⁴² Taylor v. Collins, 51 Wis. 123; Ottumwa Woolen Mill Co. v. Hawley, 44 Ia. 57; Northern Central R. Co. v. Canton Co., 30 Md. 347; Wagner v. Cleveland T. R. Co., 2 Ohio St. 563; Minneapolis Co. v. St. Paul Co., 69 U. S. 645.

¹⁴³ Tift v. Horton, 53 N. Y. 377;

Voorhees v. McGinnis, 48 N. Y. 278; Fratt v. Whittier, 58 Cal. 126; Joslyn v. McCabe, 46 Wis. 591; Sampson v. Graham, 96 Pa. St. 405; Tyson v. Post, 108 N. Y. 217; Curtiss v. Riddell, 89 Mass. 185; Managh v. Whitwell, 52 N. Y. 146.

CHAPTER II.

TENURE OF REAL PROPERTY.

- SEC. 20. The term "tenure" defined.
21. Technical nature of the subject.
 22. The feudal system in its relations to tenure.
 - a. Note on feoffment.
 - b. Note on the statute of *quia emptores*.
 - c. Views of Mr. Hallam and Mr. Pollock.
 23. Effects of the American Revolution on the law of tenure in this country.
 24. Waning influence of feudal tenures.
 25. The common law as affecting tenure.
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§ 20. The term "tenure" defined. This term "tenure" signifies the mode of holding an estate in realty and may include the naked possession of a squatter or the proprietorship of one holding by fee simple.¹ In America the title to land is essentially allodial and every tenant in fee simple has an absolute

¹ Richman v. Lippencott, 20 N. J. L. 59.

and perfect title, yet, in technical language, his estate is called an estate in fee simple, and the tenure free and common socage. This technical language is very generally interwoven into the jurisprudence of the States, though no vesture of feudal tenure may remain.²

Land, then, is the object of tenure, and the law of tenure was applied only to land. Chattels were not treated as fit objects of feudal tenure. The transient nature of goods, and the uses to which they are commonly put, are opposed to any such arrangement. They are looked upon as objects of property merely.³

"Some mode of tenure is incident to every government; and the highest estate which a man can have in land has direct reference to his duty to the State, being called a tenancy in fee simple; while the occupant is a tenant in fee, and is said to have and to hold his lands, to him and to his heirs. He holds of the State to which he owes fealty and service; and, if he fails in his allegiance to her, or dies without heirs upon whom the duty may devolve, the tenure is at an end, his land returns to the common stock from which he had it, and vests again in the State sovereignty as the lord paramount."⁴

The doctrines derived from the feudal law, which so closely limited the creation and transfer of future estates, have passed or are fast passing away. Any reasons for their existence are gone, and under the joint actions of the Legislatures and courts, they have themselves almost disappeared. Of all that forest of learning there remains here and there only a stump over which an unlucky testator may stumble.⁵

Under the word tenure is included every holding of an inheritance, but the signification of this word, which is a very extensive one, is usually restrained by coupling other words with it; this is sometimes done by words which denote the duration of the tenant's estate; as, if a man holds to himself and his heirs, it is called tenure in fee simple. At other times, the tenure is coupled with the words pointing out the instrument by which an inheritance is held; thus, if the holding is by copy of court-roll, it is called tenure by copy

² 3 Kent, 487.

³ Williams Real Prop. 5.

⁴ Taylor's Landlord and Tenant, p. 1.

⁵ Preface Gray on Perpetuities.

of court-roll. At other times this word is coupled with words that show the principal service by which an inheritance is held; as, where a man held by knight-service, it was called tenure by knight-service. 5 New Abr.⁶

The only feudal fictions and services which can be presumed to be retained in any part of the United States, consist of the feudal principle, that the lands are held of some superior lord, to whom the obligation of fealty, and to pay a determinate rent, are due.⁷

§21. Technical nature of the subject. The law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy. We have either never introduced into the jurisprudence of this country, or we have, in the course of improvements upon our municipal law, abolished all the essential badges of the law of feuds; but the deep traces of that policy are visible in every part of the doctrine of real estates, and the technical language, and many of the technical rules and fictions of that system are still retained.⁸

We may add that the entire subject has been encumbered by visionary speculations of doubtful value, and has been especially unfortunate in being fettered in technical language that has long survived the reason of its employment. To the pedants of the dark ages, who were the exclusive custodians of the little learning that then flickered in the world, it was a matter of mighty concern that the administration of law should be confined within a narrow circle, and that a monopoly of learning would diffuse itself among a coterie of ecclesiastics whose constant struggle was to make that learning more difficult to obtain. In consequence we have had transmitted to us a vast and intricate system founded upon innumerable precedents and enactments, and interpreted by a horde of acute logicians, who pursued every ramification of the subtlety to its earliest source, and literally thatched every topic in the law with refinements and technique, until

⁶ Jacob's Law Dict.

⁸ 3 Kent's Com. p. 501.

⁷ 3 Kent's Com. p. 676.

so late as the time of Lord Mansfield it had become an impenetrable jungle to all but the elect.

X § 22. **The feudal system in its relations to tenure.** The learning upon this subject is both various and profound. It has engrossed the attention of many acute and brilliant minds and has been enriched by the scholarly researches of such celebrated historians as Freeman, Maine, Hallam and a host of others. The morbid excess of such exposition in our modern text-books offers a perpetual snare to the peace of mind as well as to the patience of the student who is too deeply infatuated with the actualities of the law to admire the effete learning of the dark ages. If we were to obey and follow the manifold caprices of text-writers and were solicitous for an opportunity to display an abysmal pedantry we might exploit ourselves upon this senseless topic "*ad nauseum*" and yield a hasty self-surrender to impulses of permanent disgust. To those fond of historical research the topic will yield many attractions especially if perused in the delightful pages of so accomplished an author as Sir William Blackstone. In the modern law of real property it is about as important as the Ante Nicene views of the Trinitarian doctrine or the speculations of the old Ptolmeites over the Lost Pleiad. The Psalmist limits life to "three score years and ten," and within this limitation we shall not attempt the absorption of the entire gamut of human knowledge or indulge in froth-eddys of talk about so bed-ridden a theme as the feudal system. However, a brief synoptical review of the prominent incidents of that system may be considered opportune, and certainly is in strict conformity with time-honored usage. The manner in which real property was held and owned in England, subsequent to the Norman conquest, and which has modified and given great impulse and direction to the law of realty in that country, and to a certain extent in this, was based upon the political institution known as the feudal system.

This was introduced into England by William the Conqueror purely as a military measure — one best calculated to conserve the interests of the new proprietors and cement and seal the conquest they acquired. Its pivotal concept was

the legal fiction that to the "sovereign" belonged the soil. The use of the land was granted to others upon certain stipulated conditions, usually in the way of service. The entire country was subjected to an accurate survey, and was apportioned among the officers and soldiers of the invading army. A curious survival of this survey is still to be seen in the famous Domesday Book, which recorded the respective boundaries of the sixty thousand Feifs into which the country was divided. The one who had the use of the land was termed a vassal or feudatory, and his holding was supposed to be in strict subordination to that of his lord. The holding itself was termed a feof, fued or feud, and the manner in which this was held was termed a *tenure*, while the right to hold constituted his *seisin*. The Lord was called the Feoffer, the vassal the Feoffee, the act confirming his right was termed a feoffment,^a and this investiture was otherwise known as the livery of seisin, usually a symbolical process invested with more or less solemnity.

The process of granting an estate by the original feoffee out of his fee was what constituted the subinfeudation. The entire system of feudal tenures was originally a temporary expedient, terminable on the mere whim of the lord, and usually existed from year to year. Gradually they became extended for the lifetime of the particular vassal, and this method in its turn gradually gave way to an hereditary right, usually reposing in the eldest son.

The services rendered for the use of the land were some-

a.⁹*Note on feoffment.* In the United States the only method of transferring real estate is either by deed or will, hence the mediæval terms "feoffment," "feoffor" and "feoffee" have become practically obsolete. It may be said, however, that under the Plantagenets and Tudors the only mode of converting freehold land in possession from one person (the feoffor) to another (the feoffee) was by this process of feoffment. Williams says that the only case in which a "feoffment" is now

required is where an infant tenant of gavelkind land wishes to dispose of his estate; this he can do by "feoffment" at the age of fifteen. (Williams Real Prop. 129.) The subject is bereft of all importance on this side of the Atlantic and is only referred to in this connection because we are facing a perpetual anxiety to make this present undertaking as instructive and exhaustive as our limits will allow.

what varied, those of a military nature assuming the name of knight-service, while others were peaceful and certain, generally consisting in the payment of rent or the performance of labor, and were called socage. The incidents attaching to knight-service — which was regarded as the most honorable of all the feudal tenures — was service on the lord in time of war, payment of certain stipulated sums, in some cases, in order to ransom him if taken prisoner, and reliefs or fines paid to him by the heir of the vassal as a condition precedent to succeeding to the estate. Wardship and marriage, or the right which the lord had to dispose of the person and property of the ward during minority, was another incident of the system. A marriage without the consent of the lord paramount gave the latter the right to impose a fine. Escheat was the right which the lord had to the entire real and personal property of the vassal, when the latter died without heirs, or when his civil death had been decreed as a result of treason or felony. This was a most exasperating and offensive measure and led to great abuses. The more wealthy and prominent a vassal became the more liable he was to some trumped up charge of treason or felony, proved without due evidence, and instituted solely in order to vest the lord paramount with his property.

Military tenures of every description were formally abolished at the restoration of the Stuarts in 1660, and all lands were declared to be holden in free and common socage, with a few trifling exceptions. By the practice of subinfeudation¹⁰ many of the observed feudal incidents were evaded, and these perpetual evasions resulted in the passage, toward the close of the thirteenth century, of the celebrated statute of *quia emptores*,¹¹ (18 Edward First, chap. 1), the purposes of which

¹⁰ Subinfeudation denotes the act of an inferior lord by which he carved out a part of an estate which he held of a superior, and granted it to an inferior tenant to be held of himself. It was an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation; this was forbidden by

the Statute of *Quia Emptores*, 18 Ed. I; 2 Bl. Com. 91; 3 Kent Com. 406; 2 Bouvier's Law Dict. 553.

b. ¹¹ *Note on the Statute Quia Emptores*. The Statute *Quia Emptores Terrarum* (18 Edw. 1, c. 1, 1 A. D. 1289) enacts that on all conveyances in fee, the tenant shall not hold of the grantor, but of the grantor's lord. This puts an end to the subject of

were primarily the recognition of the vassal's right to alien his estate, but enacted that the sub-tenants should still be regarded as holding of the lord in precisely the same manner as the original vassal had done.

Feudal tenures in England were:

Tenures by knight-service.

Tenures by socage.

Tenures at burgage.

Tenures at gavelkind.

Tenures at copyhold.

Tenures in frankalmoigne.

Tenures by petit serjeanty.

For an extended account of the feudal system in its juristic relations see Sullivan's lectures (University of Dublin); Spence's Eq. Jur.; 2 Bl. Com. 44, while for its social and political peculiarities the student should consult Hallam's Middle Ages; Maine's Ancient Law, and Guizot's History of Civ.

c. *Views of Mr. Hallam and of Mr. Pollock.* Mr. Hallam says: "Whether the law of feudal tenures can be said to have existed in England before the conquest, must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution, three things are to be considered, the principle, the form and the name. The last will probably not be found in any genuine Anglo-Saxon record; of the form of the peculiar ceremonies and incidents

subinfeudation. In *Jackson v. Schutz*, 18 Johns. R. 179, Chief Justice Spence remarked, in the course of the argument for the plaintiff, that the Statute of Quia Emptores never existed in New York. But the opinion of the court, delivered by Platt J., was different, it holding that the Act of 1787, simply adopted in express terms such of the English Statutes respecting tenures, as were deemed to be in force in New York. In *DePeyster v. Michael*, 2 Selden

R. 503, the court referred to a previous statute of New York, essentially affecting tenures. And it was assumed that the Statute of Quia Emptores had never been in force within the colony of New York. But in *Van Rensselaer v. Hays*, 19 N. Y. (5 Smith) 68, the Court of Appeals held that the Statute of Quia Emptores was brought by our ancestors to the colony of New York, and became a part of its law and the law of this State, independent of the statute of 1787.

of a regular fief, there is some, but not much appearance. But they who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman Conquest."¹²

What is characteristic of the feudal period is not the relationship between letter and hirer, or lender and borrower of land, but the relationship between lord and man, or between lord and vassal, or, rather, it is the union of these two relationships. Were we free to invent new terms, we might find "feudo-vassalism" more serviceable than feudalism. But the difficulty is not one which could be solved by any merely verbal devices. The impossible task that has been set before the word "feudalism" is that of making a single idea represent a very large piece of the world's history — represent the France, Italy, Germany, England of every century from the 8th or 9th to the 14th or 15th. The history of feudal law is the history of a series of changes, which leave unchanged little that is of real importance.¹³

§ 23. Effects of the American revolution on the law of tenure in this country. The revolution and subsequent legislation emancipated the soil from the chief characteristic of the feudal system. After this change, the proprietaries held their land as other citizens under the commonwealth, by a title purely allodial. Lands are now held mediately or immediately of the State, but by titles cleared of the rubbish of the dark ages, excepting only the feudal names of things no longer feudal. * * * The State sold her lands for the best price she could get, and conferred upon the purchasers the same absolute estate she held, excepting the fifth part of any gold or silver found, and six acres in the hundred for roads; and these have been reserved, as everything else has been granted, by contract. Her patents acknowledge a pecuniary consideration, and stipulate for no fealty, escheat, rent-service, or other feudal incident. The State is the Lord paramount as to no man's land. When any of it is wanted

¹² Hallam's Middle Ages, p. 88. ¹³ History of English Law (Pollock), 44.

for public purposes, the State, in virtue of her political sovereignty, takes it, but she compels herself, or those who claim under her, to make full compensation to the owner.¹⁴

§ 24. Waning influence of feudal tenures. Mr. Washburn's unrivalled power of generalization is never more seductively displayed, than when in elaboration of some recondite topic connected with mediæval law. His incomparable diction will always charm if it does not convince, and while we may dissent from his conclusions, we invariably yield all homage to the graces of a style that is seldom rivalled in the entire domain of legal literature. It is with a regret that is bordering on remorse, that we feel impelled to dissent from his averment regarding the necessity for a close and accurate study of feudal tenures, in order to clearly comprehend the intricate mazes of our modern law. Few practitioners, in the stress and swirl of a hotly contended case, care to disturb the rubbish of the dark ages in order to reach the root of things; and however entrancing the study, and desirable the result, disquisitions of this character are entirely out of place in a text-book that aims at both brevity and usefulness. We are somewhat familiar with the "grandeur that was Greece, and the glory that was Rome," but we submit with due deference that the histories of Grote and Gibbon are the appropriate repositories of all this, and that it is bordering on rank pedantry to introduce the polity of forgotten ages to the American student who is struggling to comprehend the law of real property in these closing hours of the nineteenth century. Such studies only "lead to bewilder, and dazzle to betray." It has been truthfully remarked by Chancellor Kent that the modern law of real property forms the most intricate and subtle topic known to the science of the law. Why add to this intricacy in confusion by disquisitions upon the system that never had the least hold upon the jurisprudence of the western world, and only survives to a limited extent in technical terminology.

In this country none of the peculiar incidents of feudal

¹⁴ Wallace v. Harmstad, 44 Pa. 500 (1863), Woodward, J.; Hubley v. Vanhorne, 7 S. & R. 188 (1821), Gibson, J.; 3 Id. 447; 9 Id. 333; see Green, Short Hist. Eng. Peop. 112-14; Anderson's Law Dict.

tenure attach to an estate granted by one person to another. For example, the notion no longer prevails that an ultimate estate remains in the grantor of a fee-simple; or that he has a possible reversion, by escheat or otherwise; or that the estate, granted by him, is subject to certain inseparable conditions implied by law in his favor; such as that the grantee shall not alien, or shall render service or rent, and in case of default shall forfeit the estate. These rules, and many others that might be referred to, which were of feudal extraction, or resulted from the obligations arising out of the feudal relation, are now abrogated.

§ 25. The common law as affecting tenure. The common law is not in its nature and character an absolutely fixed and inflexible system like the statute law providing only for cases of a determinate form, which fall within the letter of the language in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual change of trade and commerce, and the mechanic arts, and the exigencies and uses of the country. There are certain fundamental maxims in it which are never departed from. There are others again, which, though true in a general sense, are at the same time susceptible of modifications and exceptions to prevent them from doing manifest wrong and injury. See, "Report of the Committee on Codification" to the Legislature of Massachusetts, Dec. 1836.

"Its sources are to be found in the usages, habits, manners and customs of a people; its seat, in the breasts of the judges who are its expositors and expounders."¹⁵ It is supposed to develop new principles, and extend old ones by analogy. But in this country the appalling mass of our statutory law has left little for the English common law to act upon, and when we consider that our ancestors only brought such portions of it as were applicable to our condition, and that the legislation of nearly 300 years has had a very demoralizing effect upon that portion, it will be grudgingly admitted, even by common law pundits, that the American law is

¹⁵ Jacob v. State, 3 Humph. 493.

essentially an indigenous growth, based, of course, upon the primitive notions of our English and Norman-French ancestry.

a. *Views of Judge Bouvier.* The common law is that which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the Legislature, by an express act, which is the criterion by which it is distinguished from the statute law. It has never been reduced to writing; by this expression, however, it is not meant that all those laws are at present merely oral, or communicated from former ages to the present solely by word of mouth, but that the evidence of our common law is contained in our books of reports, and depends on the general practice and judicial adjudications of our courts.

The common law is derived from two sources, the common law of England, and the practice and decision of our own courts. In some States the English common law has been adopted by statute. There is no general rule to ascertain what part of the English common law is valid and binding. To run the line of distinction, is a subject of embarrassment to courts, and the want of it a great perplexity to the student. (Kirb. Rep. Pref.) It may, however, be observed generally, that it is binding where it has not been superseded by the Constitution of the United States, or of the several States, or by their legislative enactments, or varied by custom, and where it is founded in reason and consonant to the genius and manners of the people.¹⁶

b. *Of Prof. Walker.*¹⁷ It is said to be unwritten, because there is no record of its formal enactment. It is sometimes pretended that it consists of statutes worn out by time, their records having been lost. It is also called a collection of customs and traditions commencing in immemorial times, acquiesced in by successive generations, and gradually enlarged and modified in the progress of civilization. The true account, however, is, that it is the stupendous work of judicial legislation. Theorize as we may, it has been made

¹⁶ Bouvier's Law Dict., title Law. 243, 312; Sackett v. Sackett, 3

¹⁷ See 1 Story Const. secs. 156- Pick. 309; Patterson v. Winn, 5 158; Linsley v. Coats, 1 Ohio Rep. Pet. 233, 8 Id. 637.

from first to last by judges; and the only records it ever had are the reports of their decisions, and the essays, commentaries, and digests founded thereon.¹⁸

c. *Of Mr. Burrill.* But to what extent the common law has been adopted in the federal jurisprudence of the United States, does not seem to be settled. It has indeed been expressly held, that there can be no common law of the United States, and that the common law of England is not in force in the United States as a federal government.¹⁹ According to other authority, the Constitution and laws of the United States are predicated upon the existence of the common law, and that law is appealed to by the Constitution, for the construction and interpretation of its powers.²⁰

§ 26. **Analysis of the common law system.** Comprehensively, the common law of England is the unwritten law of that country, as distinguished from the written or statute law. This is the definition of the Commentaries and there may have been a time when it was applicable, but in a strict sense it has long since ceased to be so. Except when law is known exclusively to a privileged minority "there is no such thing as unwritten law in the world. There was once a period when the English common law might reasonably have been termed unwritten. The elder English judges did really pretend to a knowledge of rules, principles and distinctions, which were not entirely revealed to the bar and the lay-public. Whether all the law which they claimed to monopolize was really unwritten, is exceedingly questionable; but, at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the courts began to base their judgments on recorded cases, whether in the year-books or elsewhere, the law became written — written case law and only different from code law because written in a different way."²¹

¹⁸ Walker's Am. Law, 53.

¹⁹ McLean, J., 8 Pet. R. 658; Blackford, J., Blackf. R. 205.

²⁰ Story, J., 1 Gallison's R. 488, 489, 520; See 3 Wheaton's R. 223; 1 Gallison's R. 20; 1 Kent's Com.

338, 339; United States Digest, Common Law; 1 Burrill's Law Dict.

²¹ Maine's Ancient Law, 12, 13; see 4 Broom & Had. Com. 498 to 505; 2 Id. 652 to 656, Wait's ed.

In the time of Lord Eldon the unwritten law of England (so-called), was admitted to be so completely expressed by written case law, that so careful a writer as Mr. Maddock did not hesitate to emphasize the fact in the following strong language which also approves copious citations of authorities. "To some, the numerous citations of cases may seem like an ostentation of reading; but every careful professional man is fully aware that the greatest merit in a legal writer will not compensate for the want of cases in support of his positions. In an English court of justice, the veriest dolt that ever stammered a sentence would be more attended to with a case in point, than Cicero, with all his eloquence unsupported by authorities; and it is fit it should be so, for how otherwise can law be what it ought to be — a certain rule of conduct."²²

a. *How brought to this country.* Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation.²³

The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the Crown, and as the king was not within the statute *quia emptores* a certain tenure, which after the act of 12 Charles II (ch. 24), abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th Edward I.²⁴ But

²² Madd. Ch. Pref. XIV.

gardus v. Trinity Church, 4 Paige, 178.

²³ 1 Kent, 473, and cases cited in note A to the 5th ed.; Bo.

²⁴ The People v. Van Rensselaer, 5 Seld. 334.

with the exception of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system during the whole colonial period and for the first ten years of the State government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the conquest, before the commencement of the Year Books, and long before Littleton wrote his treatise upon Tenures."²⁵

b. *Extent of its adoption in America.* It is a mistake to assume that the common law of England, though adopted and accepted as the law of the States, and though unchanged by statute, is under all circumstances and conditions to be applied as the local common law. In many instances a directly opposite rule is the common law of the State. In *Vicksburg and J. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 552, the rule of the common law that a man should fence in his cattle was declared to be "inapplicable to our condition," and the right of free pasturage was held to exist as a part of our common law, and the duty of fencing them out was devolved upon other land owners desiring to exclude them from cultivated or other lands."²⁶

c. *Not known as a national customary law.* There is no common law of the United States, in the sense of a "national customary law," distinct from the common law of England, as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes." A determination in a given case

²⁵ Per Denio, J., in *Van Rensselaer v. Hays*, 5 N. Y. 68, 73.

Miss. 650; *Crane v. French*, 38 Miss. 503.

²⁶ See also *Green v. Weller*, 32

²⁷ *Wheaton v. Peters*, 33 U. S. 591.

of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. * * * There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting upon national authority.²⁸

As for the states themselves, the common law of England, as it existed at the time of the revolution, together with such of its statutes as reasonably applied to the colonies, became at that time the common law of the States. In this country, as in England, of course, the body of the common law has developed with growing industrial conditions and has on the other hand been from time to time restricted by statutes of the States or of the United States. What we have said in regard to the common law of the States has one exception, Louisiana, which, when ceded to this country retained in the main the system of Roman civil law already existing. The common law on a given point is always set aside by a statute covering that point; thus, in the United States, the order of authority of law is: the federal Constitution; the treaties and acts of Congress; the Constitution of the State; the statutes of the State, and finally the common law. When a statute is rescinded the common law on

²⁸ *Smith v. Alabama*, 124 U. S. 478 (1888), cases, *Matthews, J., cit-* ing *Moore v. U. S.*, 91 U. S. 270; 23 *Led.* 346.

that point again becomes of force unless there be an older statute, in which case that revives."²⁹

d. *Its repellant features.* Notwithstanding the veneration with which all lawyers are expected to regard the common law, its mode of procedure, in many respects, had but little to recommend it as a direct and convenient medium for the administration of justice. Many of its rules were technical and arbitrary, and, to the understanding of the present age, founded upon no substantial reasons, and in many cases the alleged reasons upon which they are founded have become misty or forgotten.³⁰

In all of the American States, the scope and nature of landed property has been specifically defined and regulated by statutory law, and many of the old common law incidents have been abolished.

e. *Great achievement of Sir William Blackstone.* We yield to none in admiration of the mighty achievement of Sir William Blackstone in the digesting and codification of that "abyssmal welter" known as the English common law. He brought to the consideration of his task a classic elegance of diction, phenomenal zeal, rare attributes of classification and all the ripened experience of a peerless legal mind. His fame is imperishable; and it is furthest from our purpose to attempt the belittlement either of the man or his achievements.

It will be observed in this connection that our hostility to Blackstone relates merely to its preliminary study. If read under the more favorable auspices that always accompany the expansion of professional research, the rare fascination of the style and the felicitous evasion of the many embarrassments that form the "mingled lock of Teutonic, Feudal, Parliamentary and Ecclesiastical legislation" give to the "Commentaries" every quality of a classic written for all times and creeds.

Especially taken in connection with the equally sumptuous work of Sir Henry Maine on "Ancient Law," and with Mr. Hallam's celebrated "Constitutional History," we have an elaborate presentation of the inception and development of

²⁹ 4 International Cyclopædia.

³⁰ Kimbal v. Lohmas, 31 Cal. 158.

English jurisprudence that no legal equipment is complete without. Far from deploring this study, we would encourage and stimulate it, but we would inexorably stipulate that it be undertaken at a time when its want of adaptability and adjustment to existing conditions can be more readily discerned, to the end that the student may evade the insidious approaches of a false theory that must be first learned with great study and promptly forgotten with great pains.

Further, we may be allowed to say that a course of study that aims at the laborious exposition of principles of law that have lost their efficacy or application; of theories that have been exploded beyond the influence of gravitation; of a terminology that has not even a hospitable reception in our language; of rules of pleading that have no affinities in our codes; of criminal laws that are a smear alike upon our civilization, our humanity and our common sense, is now, and ever shall be, an imposition upon practical methods, a prostitution of mental energy, a useless and senseless parade of pedagogic whim-wham, that stuffs the receptive minds of our most brilliant and assiduous scholars with a pestiferous mass of unassimilative matter.

Who quotes a paragraph from Blackstone? Where, throughout the entire tenor and trend of our voluminous litigation, do you ever hear a sentence that is solely attributable to him? At rare intervals, some venerable anatomical ruin that has miraculously eluded burial, and makes longevity disreputable by still persisting in it, electrifies both bench and bar by quoting some bedridden truism that nobody doubts or nobody knows, but it is like opening the "Sixth Seal," in Revelation, and only emphasizes the truth of Ben Butler's sententious remark, "Law must be of divine origin to have survived the fools hired to expound it during the last hundred years."

In a spirit of expostulation and of entire seriousness, let us earnestly request a careful consideration of the views we have here outlined to the end that some correction of this intolerable abuse may be effected. These views are entirely impersonal in their aim, are merely suggestive in their import; and are "respectfully submitted" in the hope, and

with the conviction, that the agitation of the subject will disclose the merits of our contention, and vindicate the position we assume.³¹

³¹ *Note on the Blackstone Craze.* Why this abject Persian adoration for a classic one hundred years behind its time? Why this prostration before a luminary that has long since set? Why drone over mildewed laws that have long since been relegated to the "impalpable inane," and have been discredited for a hundred years, even in the land that gave them birth? It is a rank and driveling insult to the common intelligence of our profession to seriously refer to the major portion of Blackstone's Commentaries as affording even a feeble exposition of the modern law. Whole chapters devoted to the governmental and ecclesiastical policy of Great Britain have not even a nebulous bearing upon any rule whatever in vogue in this country; and, in fact, they have long been superseded by elaborate works on the British Constitution that have been out of print for half a century. What species of mental leprosy will still insist upon feeding legal minds on such Blackstonian druff as is found in his chapters on the "Benefit of Clergy," the "Feudal System," "King's Royal Family," and particularly the chapters on English Criminal law? What bewildering results are the legitimate outcome (in view of our various practice acts and codes of civil procedure), of study upon "Pleading and Practice at Common Law?" Glance at the subjects of bailment, easements, fixtures, etc., and consider the monumental importance

of these topics under our present scheme of law. Refer to Blackstone's chapter on "Trial by Jury," and introduce us to one line that can safely be regarded as elucidative or even suggestive of that procedure under modern rules. Consider in its entirety the treatment he accords to "real property," and you will find that, aside from the mere tabulation of definitions, the entire topic serves no practical purpose here or hereafter, and only "leads to bewilder and dazzles to betray." It is quite time that this extravagant estimate of Blackstone was called to a new audit.

Judge Cooley, whose legal acumen is above compare, whose logical perceptions are of the keenest, whose eloquence always charms if it does not always convince; Judge Cooley, whose reputation as a text writer is second only to his national reputation as a scholar and a jurist, devotes some of the most brilliant paragraphs he ever penned to an elaborate special plea, based upon the proposition, by no means conceded, that the best aid to a proper understanding and interpretation of the law is founded upon the study of Blackstone. His Honor says (see preface): "Although there are many things in Blackstone which have ceased to be important in the practical judgment of the law, can we with prudence or propriety omit to make ourselves acquainted with them? Things which are abolished or obsolete may, nevertheless, have furnished the

f. *Disintegration of early common law methods.* A steady process of disintegration has been affecting the common law ever since its formal adoption in this country. In the first place, it must be borne in mind that only such portions were

reasons for the things which remain, and to study rules, while ignoring their reasons, would be like studying the animal anatomy, while ignoring the principle of life which animates it." In effect His Honor makes it appear that in the present inchoate state of legal science, unless we resort to Blackstone, it is impossible to find good rules for study that are still attached to some equally good reason, where both the rule and the reason for it are equally important to know, and where a want of that knowledge is alike fatal to the attorney's reputation and the success of his client's cause. Just how far an "abolished" or "obsolete" thing can furnish the reason for the things which remain, is an enigma for Jesuitical caustics; but we submit that "*Cessante ratione legis cessat ipso lex*" is a maxim of extended application. If the rule and the reason for it both cease, why study it? "Why, nursing fathers, why?" The fate of the Roman world was once decided by the flight of the twelve vultures. Later on the Roman augurs cast the horoscope of the Imperial City after the due inspection of chicken bowels and the fall of the Midriff, but the reason for all this has vanished ages ago. Why study it?

What the practitioner of the present day demands in the stress and swirl of titanic litigation is not metaphysical disquisition upon the reasons that led to the abolition of

the "Feudal System" or the revamping of the law of "feoffment" in the reign of Queen Anne. He is not in a maniacal panic to probe the entire "Polity of the Colonial Possessions," nor to surmount the difficulties of chapter 8, book 4, on the wondrously fascinating topic of "Præmunire," that few doctors of law can spell correctly, fewer still define, and none expound. We suspect that it will considerably corrode the fragile tendrils of his recollection to get the law reduced to its ultimate essence without lumbering his capacious mind with moss-grown and mildewed theories about "entail," "livery of seizin" and "primogeniture."

He is quite likely to grapple with a large-sized conundrum when he undertakes to absorb the principles of our equity jurisprudence and the variant applications of our statutory law. He is on "desperate seas with the lost digamma" when he undertakes to explore the labyrinth of our "code practice," and the subject of "Evidence" alone is quite likely to procure cerebral congestion and dire tarantula jiggling, unless his capacities for assimilation are of the Napoleonic type.

What has made the writer's contention so peculiarly offensive is the impossibility of refuting it. After struggling against our instincts and with a paralytic flux of words, we conclude that the common law professors (who are the

adopted as were "applicable to our condition." In the second place, it must be remembered that a vast portion of our territory — that acquired by the Louisiana purchase from Napoleon, as well as the immense domain acquired by conquest from Mexico — have never been under the influences of the common law system or procedure, while, since the Revolution, the entire tenor and trend of legislation have been in direct impairment of any survivals of the common law previously in vogue.

When we comprehend the stupendous mass of our variant State and Federal legislation — legislation which has affected almost every conceivable phase of property and individual rights — and when we consider that this legislation is in every instance an abrogation of common law text, although it may be a confirmation of some common law principle, the fact remains that the statute is the controlling incident. It

ones chiefly infatuated with Blackstone) should vindicate themselves from the suspicion of being biased by reading and digesting some wholesome American law extracted from the works of Dillon, Pomeroy, Wharton, Redfield, Abbott et al.

But it is urged in behalf of the Blackstone craze, "that its mental discipline is of an exceptional order." Indeed! And are there no other ways known under heaven and among men by which the sensitized minds of our law students can be "disciplined?" Is there no tenacity of memory or mental discipline required in the study of Mr. Chancellor Kent? Does not robusticity of thinking lurk in the pages of Judge Story, or infest the screeds of the late lamented Theophilus Parsons (now with God)? Is it not possible to block out a course of study based upon the virile living law that will enlist the surplus energies, and tax to a reasonable extent the thinking ganglia

of the average student to the extent of retiring him temporarily from the maddening pursuits of the world, the flesh and the devil?

We are grievously misinformed, our preconceptions are hopelessly awry, our theories, of which we have been excessively vain, are spectral inanities, if the average collegian, under the robust mental pabulum here outlined, doesn't wrestle with about all the "mental discipline" his god-like image cares to caress, at least until the fibres and the tendons of his callow years have attained a little more consistency and vigor. "Don't muzzle the ox that thresheth out the corn" is the suggestive injunction of Holy Writ, and don't narcotize the grey matter in a student's skull with the putrefactions of a plodding brain that ceased to act long before the birth of our century.— Cited from *Columbia Law Times*, Vol. VI.

is idle to insist that because many of these statutes merely crystallize and give fixity and brevity to a common law principle, that a study of the common law is the only method of acquiring absolute knowledge of the subject embraced. The abominations of the common law undoubtedly inspired much of our remedial legislation, but whatever the original springs and sources of our statutory law the fact remains that the statute is the sole repository of it.

§ 27. **All lands allodial in this country.** By constitutional provision in all of the American States lands are declared allodial and feudal tenures are prohibited. This implies that all land is held in free and absolute ownership in contradistinction from feudal tenures which last, as we have seen, was a cumbersome device tending to hinder a free and ready transfer of realty.³⁹ An immense amount of vehement and rather turgid eloquence has been squandered on various anathemas of the old feudal tenures which in no wise concerns our present purpose; but it is pertinent to remark that the American courts universally condemn any attempt to fetter the free and speedy transmission of real property.

The character of the title to lands in the United States since the Revolution has become allodial and as we have stated. Many of the States have so declared; notably Arkansas, California, Colorado, Connecticut, Maryland, Michigan, Minnesota, New York, New Jersey, North and South Dakota, Ohio, Pennsylvania, South Carolina, Virginia, West Virginia and Wisconsin. Even in those jurisdictions where there has been no express declaration on the subject, lands have become, in effect, allodial, by virtue of our emancipation from English rule. Tenure and its feudal incidents perished with the British sovereignty, and it is a pure parade of pedantry to revamp the musty learning of the past century, in serious support of the contention that lands in this country are anything but allodial.

§ 28. **Alienations under the mortmain statutes.** The early English works on the law of real property are offensively oppressive with long discussions upon the force and effect of the

³⁹ *Barker v. Dayton*, 28 Wis. 384.

"mortmain statutes" as passed by the English parliament. There is nothing in our early annals showing that these laws were ever engrafted upon our system of jurisprudence, and the subject is of little or no concern to an American student at the present day.

But, although we never adopted or enacted the English statute of mortmain, yet we have a decided mortmain policy. It is found in our statutes in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

"It is a statute of mortmain, resting on a mortmain policy as distinctly as any act of the British parliament. * * * The necessity is recognized of forbidding the acquisition by will, unless the Legislature in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. * * * Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But in the last hours of life, exaggerated impressions of charitable or religious duty often obscure the judgment of men and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. The enactment is, therefore, prohibitory, and it ought to be expounded and applied in that sense."³³

Judges have given the widest possible scope to statutes in restraint of the disposal of property in mortmain, and have been astute in their arguments for the application of such statutes to cases as they arose.³⁴

The courts ought not to impute an intent to the Legislature not clearly expressed, in direct hostility to the traditions and policy of the past. * * * Claiming property and seeking the aid of the courts to reach it, the corporation can rely only on the warrant and authority of its charter.

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this State

³³ Per Comstock, Ch. J., in *Downing v. Marshall*, 23 N. Y. 366, 387.

³⁴ Per Gibson, Ch. J., in *Hillyard v. Miller*, 10 Pa. 326.

holds lands, Here there is no vassal and superior, but the title is absolutely in the owner, and subject only to the liability to escheat.³⁵ The escheat takes place when the title to lands fails through defects of heirs.³⁶

§ 29. **What law governs alienations.** The *lex loci rei sitæ* exclusively governs the alienation of land, and the instrument purporting to convey it must be construed by the rules affecting the property in the jurisdiction where it is situated. The formalities of the transfer are here alluded to — these must substantially conform to the legal methods sanctioned in the particular jurisdiction where the controversy arises — and similarly all remedies touching real property must comply with the legal or equitable procedure adopted in the State where the realty is located.³⁷ And hence titles acquired through probate proceedings, instituted in another jurisdiction, do not affect lands situated beyond the limits of that jurisdiction.³⁸

§ 30. **The term title defined.** Title, in popular apprehension, refers rather to the instruments which are usually relied upon to evidence the title, and to the outward assertive acts that import dominion, than to the strict legal means “whereby the owner of lands hath the just possession of his property. A title is a lawful cause or ground for that which is ours.” (Co. Litt. 345b.) An interest, though primarily it includes title, has latterly acquired a subordinate meaning, and usually suggests some fractional share or fugitive concern in property, inconsistent with the absolute and arbitrary sole domination over it. The term has been one of no ordinary vexation to lexicographers who quarrel with Blackstone’s and Coke’s definition, and are equally dissatisfied with both.³⁹ To me the definition of the Georgia Code is the most concise and accurate. “Title is the means whereby a

³⁵ N. Y. Const. art. 1, sec. 13.

³⁶ N. Y. Const. art. 1, sec. 11.

³⁷ Robinson v. Campbell, 3 Wheat. 207; U. S. v. Fox, 94 U. S. 315; McGoon v. Scales, 9 Wall. 23; Jones v. Habershan, 107 U. S. 174; Suydam v. Williamson, 24 How. 427;

Brine v. Hart Fire Ins. Co., 96 U. S. 624.

³⁸ Robinson v. Peckrell, 109 U. S. 608.

³⁹ Stevens and Brown, sec. 2; Abbott’s L. Dict. 565-6-7.

person's right to property is established." Actual or constructive possession, coupled with the legal right of possession, will constitute a good and sufficient title. This legal right of possession must be such as would authorize a court of competent jurisdiction — possessing full information of all the facts and circumstances connected with the right claimed — to award a possessory writ, and enforce its award by the aid of a *posse comitatus* if necessary.

There are but two modes of acquiring title: (1) by purchase; and (2) by descent. Title by purchase may be acquired in a variety of ways — as by forfeiture, gift, grant (public or private), escheat, eminent domain, prescription, accretion, judicial decree, and contract, in short, by every conceivable legal mode except descent or hereditary succession. This method (of descent) presupposes the death of the ancestor, and the acquisition of the property by his legal heirs.

Title is the lawful cause or ground of possessing that which is ours (*justa causa possidendi quod nostrum est.*)⁴⁰ The means whereby the owner of lands has the just possession of his property.⁴¹ The means whereby the owner of lands, or other real property, has the just and legal possession and enjoyment of it.⁴² The means whereby a man cometh to land.⁴³ These definitions, it will be seen, confine the application of the word to real property. In modern law, however, it is constantly applied to personal property also. When two titles concur, the best is preferred.⁴⁴

According to Lord Coke, the word title seems strictly to have imported, in the old law of real property, something less than right, or, as he describes it, "title properly is, as some say, where a man has a lawful cause of entry into lands, whereof another is seized, for the which he can have no action."⁴⁵ "But legally," he adds, "it includes a right also, for every right is a title, but every title is not such a right for which an action lies."⁴⁶ Hale and Finch make a

⁴⁰ Co. Litt. 345 b.

⁴¹ 2 Bl. Com. 195.

⁴² Cruise Dig. tit. XXIX, chap. 1, sec. 2.

⁴³ Co. Litt. ub. sup., see Titulus.

⁴⁴ Finch's Law, b. 1, c. 4, n. 82.

⁴⁵ Co. Litt., 345 b., 8 Co., 153 b.

⁴⁶ Co. Litt. ub. sup.

distinction between the terms." In modern practice, however, they are constantly associated together.

A title is further described in the old books as consisting for the most part of muniments, which fortify and protect the ground of possession.⁴⁷

With the establishment of national independence in 1783,⁴⁸ the legal theory became, in the United States, that all titles to lands are derived from the government of the United States, as in England it had been that all lands are held immediately or ultimately of the king. Within the original States, only the lands remaining unappropriated, and those belonging to Tory owners, and passing by forfeiture to the government, ever actually vested in the United States. By the acquisition of the Northwest Territory and Louisiana it devolved on the government to become the distributor, to private owners, of an area east of the Rocky mountains, as large as China, and half as large as Europe. The present total area of the United States, including Alaska, is 3,603,884 square miles, exclusive of the lakes and other waters, while that of Europe is 3,828,328 square miles.

In the United States, government is theoretically considered the source of all titles to land, but in the proper feudal sense, the principle of tenure seems to be abrogated; tenants in fee being to all intents and purposes the absolute owners of their estates.⁴⁹ In some of the States, tenure in socage is said still to exist in theory, but in others it has been expressly abolished, and practically all land is now held by an allodial title.⁵⁰ There is high authority, however, for the opinion that the great feudal principle of tenure has been acknowledged in American jurisprudence, that we have no lands which are properly allodial, that is, which are not holden.⁵¹ The idea of tenure certainly pervades, to a considerable degree, the law of real property in this country, and the language of tenure is everywhere in constant use,

⁴⁷ See Hale's Anal. sec. XXXII; Finch's Law, b. 2, chap. 2.

⁴⁸ 2 Burrill's Law Dict.

⁴⁹ Supreme Ct., *Johnson v. McIntosh*, 8 Wheat. 543, ¶ 3 Op. Atty.-Gen. 333.

⁵⁰ See 1 Hilliard's Real Prop. 79-81 (37).

⁵¹ See 3 Kent's Com. 488, 509-514; 1 Hilliard's Real Prop. 80, 81 (39).

⁵² 1 Greenleaf's Cruise Dig. 23, note.

all proprietors, owners, or holders of real estate being technically denominated tenants.⁵³

The Revised Constitution of New York, of 1846, declares that the people, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and that all lands, the title to which fails from a defect of heirs, reverts or escheats to the people.⁵⁴

To have a good title to land is to have the essential power of ownership, viz., the right to maintain or recover possession of the land as against all others.

§ 31. Discovery as affecting — Views of Chancellor Kent. The rights of the British government within the limits of the British colonies, passed to the United States by the force and effect of the act of independence; and the uniform assertion of those rights by the crown, by the colonial governments, by the individual states, and by the Union, is, no doubt, incompatible with an absolute title in the Indians. That title has been obliged to yield to the combined influence which military, intellectual, and moral power gave to the claim of the European emigrants. The right of discovery was not recognized in the Roman law. It is an imperfect title unless followed by occupation, and unless the intention of the sovereign or State to take possession be declared or made known to the world.⁵⁵ This is the language of the modern diplomatists and publicists, on the part of England, Spain, Russia and the United States. Mere transient discovery amounts to nothing, unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the State.⁵⁶

The English possessions in America were not claimed by right of conquest, but by right of discovery. According to the principles of international law, as then understood, the Indian tribes were regarded as the temporary occupants of the soil, and the absolute rights of property and dominion

⁵³ 2 Burrill's Law Dict.

⁵⁴ Art. 1, sec. 11; *People v. Livingston*, 8 Barb. R. 253.

⁵⁵ Vattel, b. i. c. 18, secs. 207, 208;

Martens' Precis. 37; Cluber, *Droit des Gens Modernes de l'Europe*, sec. 126.

⁵⁶ 3 Kent, 506.

were held to belong to the European nations by which any portion of the country was first discovered.⁵⁷

The Europeans respected the right of the natives as occupants, but asserted the ultimate dominion to be in themselves, and exercised, as a consequence, a power to grant the soil while it was yet in the possession of the natives.⁵⁸

§ 32. Indian titles abolished. In epitome, the American doctrine on the subject of Indian title is this: The Indians have no fee in the lands they occupy. The fee is in the government. They cannot, of course, alien them either to nations or individuals, the exclusive right of pre-emption being in the government. Yet they have a qualified right of occupancy which can only be extinguished by treaty, and upon fair compensation; until which they are entitled to be protected in their possession.⁵⁹

As said in *United States v. Cook*, 19 Wall, 591, they are life tenants and cannot cut timber except for improvement, for that is waste. It will thus be seen that all valid individual title must be traced to some one of the governments for whom the discoveries were made, or who claim title under them.⁶⁰

To leave the Indians in possession of the country was to leave the country a wilderness, and to govern them as a distinct people, or to mix with them, and admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of deal-

⁵⁷ *Martin v. Waddell*, 16 Pet. 409 (1842), Taney, C. J.

⁵⁸ *Johnson v. McIntosh*, 8 Wheat. 572 (1823), Marshall, C. J.; *Buttz v. Northern Pacific R. Co.*, 119 U. S. 67 (1886); 3 Kent, 379; *Anderson's Law Dict.*

⁵⁹ See the third article of the ordinance of 1787; Vattel, chap. 1, sec. 81, 209; 3 Kent's Com. 386; 1 Story, Const., sec. 7, 153; *Johnson v. Mc-*

Intosh, 8 Wheat. 543; *Jackson v. Hudson*, 3 Johns. 375; *Cherokees v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515; *Clark v. Smith*, 13 Pet. 195; *Chaffee v. Garrett*, 6 Ohio, 421; *Beecher v. Wetherby*, 5 Otto, 517.

⁶⁰ See 3 Kent's Com. 377; *Jackson v. Ingraham*, 4 Johns. 16; *Jackson v. Waters*, 12 Johns. 365; *Walker's Am. Law*, 33.

ing with them than that of keeping them separate, subordinate and dependent, with a guardian care thrown around them for their protection.⁶¹

So early as 1823 the Supreme Court of the United States refused to recognize any grant made to a private individual, by any Indian or Indian tribe, as effective.⁶² In New England alone realty seems to have been held under Indian deeds that the laws respected. But this was a startling anomaly arising from peculiar political causes, as were the purchases made from the Lenni-lennape Indians by William Penn. Such titles were merely adroit measures of passification and expediency. Nowhere have the courts recognized such titles as valid, since the treaty with the Seminoles in 1819. The contention that they had a proprietary interest in the lands they wandered over, would, if carried to its logical conclusion, support the view that they acquired a proprietorship in tide water by fishing in it. The title of the British crown was founded upon the dual incidents of discovery and conquest. Both methods have been the foundation of title from time immemorial, and are distinctly recognized by the great publicists in International Law, Vattel, Puffendorf and others. The European potentates, found no difficulty in convincing themselves that they made ample compensation to the aborigines for the summary appropriation of their lands by bestowing upon them the inestimable advantages of Christianity, as typified in the first settlers. The entire question sinks into utter insignificance at the present day, in view of the fact, that treaty stipulations, between the Federal government and all existing Indian tribes, have completely abolished the last vestige of what might have once been recognized as an Indian title. We are happily rid of a factor in the law of real property, that at one time, approached perilously near to being a perpetual source of disturbance. In 1809 the Supreme Court of New York refused to notice any title not derived from our own government. And the Legislature of that State, as early as 1813, by statute, authorized the governor "to hold a treaty or treaties on the part of the people of this State with the Oneida nation of Indians,

⁶¹ 3 Kent's Com. 506.

⁶² Johnson v. McIntosh, 8 Wheat. 543.

or any other of the Indian nations or tribes within this State, for the purpose of *extinguishing* their claim to such part of their lands lying within this State as he might deem proper, for such sums and annuities as might be mutually agreed upon by the parties.⁶³

§ 33. **Classification of American tenures.** In any logical classification of estates the mind instinctively reverts to the four fundamental principles that regulate their subdivision. Firstly, we regard the estate with reference to its "duration." Secondly, the quality of the interest held or conveyed. Thirdly, the time when the interest in the property is to commence, and, Fourthly, with regard to the number of persons who are to participate in the enjoyment. Under this first subdivision we tabulate freeholds⁶⁴ and leaseholds. Freehold interests naturally subdivide into those of "inheritance" and those "not of inheritance;" both MAY endure during the life of some person in being—the grantor, the grantee, or a third party. While leaseholds, which are regarded as inferior to freeholds, are created for a certain or uncertain period, the uncertainty being dependent upon the will of either or both of the parties who call the estate into existence. Familiar every-day illustrations of this estate arise in the constantly recurring practice of *leasing*. We all readily

⁶³ Laws of New York, 36th ses., c. 130.

⁶⁴ *Note on freeholds.* Freehold is an estate in real property, either of inheritance or for life. It is often defined as including ANY estate of uncertain duration which may possibly last for the life of the tenant at the least. Thus an estate granted to a widow during her widowhood is usually considered an estate of freehold. The term had become completely established in this sense long before the abolition of feudal tenures, and by far the greater part of the real property in England and the United States is now freehold property. The quality of indefinite

duration, and the comparative freedom of tenure, are, and always have been, the peculiar qualities of freeholds. A term for years, for however long a period and though far exceeding the duration of human life, is not a freehold. 1 Abb. Law Dict. 524.

It must possess these two qualities: (1) Immobility, that is, the property must be land, or some interest issuing out of land, or annexed to land; and (2) a sufficient legal indeterminate duration. For if the utmost period of time to which an estate can endure be fixed and determined, it cannot be a freehold. Wharton.

recognize the interest so created. "It may be for years," or from year to year, or at sufferance. The active manifestation of these estates is in the conventional relation of landlord and tenant or lessor and lessee. Recurring to our second original subdivision — that of quality — we find that an estate is, in legal contemplation, either "absolute" or "determinable." Absolute estates are, as the term imports, estates of freehold relieved of *any condition whatever*, and are of indefinite duration. They are also frequently denominated estates in fee or "fee simple." (The word "simple" adding nothing to the force of the expression.) These estates, like all others, are subject to condemnation by the State or Federal government in the exercise of the right of eminent domain, a subject to which we shall accord elaborate expansion in subsequent pages of this work. It is therefore becoming in this immediate connection, to qualify and limit the phrase "any condition whatever" as characterizing this absolute estate, by italicizing the incident of eminent domain as a proceeding which may defeat an absolute estate against the most strenuous efforts of the owner.

Resuming our analysis as to "determinable estates" it may be observed that they are under the constant menace of some possible event or contingency which may annihilate them even when a set period has been designated for their natural expiration. They are known in legal phraseology as "estates conditional," "estates upon condition," "estates upon limitation," and "conditional limitations." These arbitrary distinctions are often of great subtlety and corresponding perplexity, but in modern law are bereft of much of their former refinement. Yet as the distinctions are still recognized, I will elaborate them further on. Estates as regards their quality are also divisible into legal and equitable estates. The first imports such as are dependent upon some statutory law for their existence. While the second is a creation of equity jurisprudence exercised in furtherance of some principle clearly cognizable by equity courts, of which the entire gamut of uses and trusts furnish an apt illustration. (See p. .)

Considering estates with reference to the "*time of their enjoyment*," they are treated as estates in possession or estates

in expectancy. In the first, the right of possession is assumed to be *immediate*; in other words it is an executed estate. An estate in expectancy imports a postponement of the right of possession to some future time more or less remote; in other words it is an *executory* estate. The well known terms "vested" and "contingent" may well appear in this connection. An estate is referred to as "vested" when there is a person in being who is entitled to a present fixed title concerning which there is no speculation or uncertainty. And an estate is contingent when the title depends upon the happening of some future event.

Again, we find that vested estates possess the attributes both of executed and of executory estates. But it is only an *executed* estate that can be VESTED. Although an executory estate may under certain favoring conditions be either *vested or contingent*. One distinction must be made prominent, viz., the law will not recognize such an anomaly as an "executed contingent estate;" but will acknowledge, under appropriate conditions, the presence of a "vested executory estate."

Estates considered with reference to the number of persons in whom the title reposes, have been treated from the period of the Lombard Invasion, either as joint estates or estates in severalty. In the former class the title is vested in two or more persons. In the latter class it rests with one only. I merely perpetuate a time-honored scheme of subdivision in recognizing joint estates under five different headings, viz., joint tenancy, tenancy in common, tenancy in coparcenary, tenancy by the entirety, and tenancy in co-partnership.

It is upon the intelligent elaboration of the legal principles associated with these various estates that the success of the present undertaking largely depends. We have already a reasonably clear apprehension of land and its incidents, of the tenure of landed property, and the influence that the feudal system and the English common law have impressed upon its present characteristics. We have seen that all lands, in this country, are substantially allodial. That Indian titles have been extinguished, and all traces of foreign sovereignty, whether reposing upon discovery rights or the rights

of conquest, have disappeared with them. And we are now prepared to enter upon the minutiae and detail that should accompany the close analysis of the various subdivisions that comprise in their entirety the present law of real property. First among these subdivisions we find estates in fee simple; a topic which it is our purpose to examine in the paragraphs of the succeeding chapter.

CHAPTER III.

ESTATES IN FEE SIMPLE.

- SEC. 34. Bouvier's definition of the term fee.
35. A doubt removed.
 36. The doctrine of seizin examined.
 37. What constitutes disseizin.
 38. Effect of the word heirs in a grant in fee.
 39. Use of the word grant, estate, etc., and the effect of such use.
 40. Legal incidents of estates in fee.
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 43. Who may be freeholders.
 - a. Incidents of corporate ownership.
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§ 34. **Bouvier's definition of the term fee.** Estates in fee are of several sorts, and have different denominations, according to their several natures and respective qualities. They may with propriety be divided into: 1, fees simple; 2, fees determinable; 3, fees qualified; 4, fees conditional, and 5, fees tail.¹ A fee simple is an estate in lands or tenements which

¹ *Note on determinable, qualified and conditional fees.* A determinable fee is an estate which may continue forever. (Plowd. 557; Shep. Touch. 97.) It is a quality of this estate while it falls under this denomination, that it is liable to be determined by some act or event, expressed on its limitation, to circumscribe its continuance, or inferred by the law as bounding its extent. (2 Bl. Com. 109.) Limitations to a man and his heirs, till the marriage of such a person shall take

place (Cro. Jac. 593; 10 Vin. Abr. 133); till debts shall be paid (Fearne, 187); until a minor shall attain the age of twenty-one years (3 Atk. 74; Ambler, 204; 9 Mod. 28; 10 Vin. Abr. 203; Fearne, 342); are instances of such a determinable fee.

Qualified fee is an interest given on its first limitation, to a man and to certain of his heirs, and not to extend to all of them generally, nor confined to the issue of his body. A limitation to a man and his heirs

in reference to the ownership of individuals, is not restrained to any heirs in particular, nor subject to any condition or collateral determination, except the laws of escheat and the canons of descent, by which it may be qualified, abridged or defeated. In other words, an estate in fee simple absolute, is an estate limited to a person and his heirs general or indefinite.² And the omission of the words "his heirs" will not vitiate the estate, nor are the words "and assigns forever" necessary to create it, although usually added.³ The word fee simple is sometimes used by the best writers on the law as contrasted with estates tail.⁴ In this sense, the term comprehends all other fees as well as the estate, properly, and in strict propriety of technical language, peculiarly distinguished by this appellation.

Mr. Tiedeman, in his work on Real Property, sec. 36, says: "The word 'fee' without any qualifying adjective, implies an unlimited estate of inheritance. Such is also the case with the term 'fee simple,' and 'fee simple absolute.' The three terms 'fee,' 'fee simple' and 'fee simple absolute,' may be used interchangeably; the adjectives in the last two are surplusage."⁵

The highest estate by an allodial title is denominated a fee simple. The word "fee" is the usual term, "simple" adding nothing to the force of the expression.

It is an incontrovertible rule, that whenever an estate is given, either by deed or will, to a person generally or indefinitely, with an unlimited power of disposition annexed, it

on the part of his father affords an example of this species of estate. Litt., sec. 254; 1 Inst. 27, a 220; 1 Prest. on Estates, 449.

A conditional fee, in the more general acceptation of the term, is when, to the limitation of an estate, a condition is annexed which renders the estate liable to be defeated. (10 Rep. 65, b.) In this application of the term, either a determinable or a qualified fee may at the same time be a conditional fee. **An estate limited to a man and his**

heirs, to commence on the performance of a condition, is also frequently described by this appellation. Prest. on Est. 476; Fearne, 9.—Bouvier's Law Dict.

² Watk. Prin. Con. 76.

³ Co. Litt. 7, b; 9, b; 237, b; Plowd. 28, b; 29, a; Bro. Abr. Estates, 4; 1 Co. Litt. 1, b; Plowd. 557; 2 Bl. Com. 104, 106; Hale's Analysis, 74.

⁴ 1 Co. Litt. 19.

⁵ See, also, Allen v. McCabe, 93 Mo. 138.

invariably vests an absolute fee, and neither a remainder nor an executory devise can be limited on such an estate.⁶

The term "fee" denotes the quantity of interest the owner has in land.⁷ They are of two principles, classes, fee simple and fee tail. And the terms fee, fee simple and fee absolute are synonymous.⁸

An estate in fee simple denotes the highest possible interest a person can hold in real property. Under such an interest the owner is at liberty to devote the premises to any object not inconsistent with law, that he may deem proper. He may mortgage, lease it, sell it, give it away, or allow it to remain unoccupied. If he dies without disposing of it the property will descend to his heirs under the rules of descent. It is a pure inheritance, free from any qualification. It is an estate of perpetuity and confers an unlimited power of alienation.⁹

The test of what constitutes a suspension of the power of alienation as to real estate is that it occurs only when there are no persons in being, by whom an absolute estate in possession can be conveyed.¹⁰

§35. A doubt removed. A question or doubt has arisen whether, after all, there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute *quia emptores*. See Gray, Perp.sec. 31-40, where the question is discussed, and authorities are cited. Whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, the existence of such an estate as a "qualified or determinable fee" must be recognized in this country, and such is the general consensus of opinion of courts and text-writers.¹¹

⁶ Cook v. Walker, 15 Ga. 459.

⁷ Wendall v. Crandall, 1 N. Y. 495.

⁸ 2 Bl. Com. 106.

⁹ 4 Kent, 5; 42 Vt. 620.

¹⁰ Sawyer v. Cubby, 146 N. Y. 192.

¹¹ Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen, 159, 168; Leonard v. Burr, 18 N. Y. 96; Gillespie v. Broas 23 Barb. 370; State v. Brown, 27 N. J. L. 13; Henderson v. Hunter, 59 Pa. 335; Wiggins

Ferry Co. v. Ohio & M. R. Co. 94 Ill. 83, 93; 1 Wash. Real. Prop., 3d ed. 76-78; 4 Kent Com. 9, 10 129; See, also, of English works in addition to citations above; Shep. Touch. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise Dig., title 1, sec. 72-76; 2 Flint Real Prop. 136-138. Preston Estates, 431 441; Challis Real Prop. 197-208.

§36. **The doctrine of seizin examined.** Under the impulse of modern forms of conveyancing the ancient doctrine of "seizin" has lost much of its importance. Originally, seizin was the completion of the feudal investiture; it now means ownership. A covenant of seizin and a covenant of right to convey are synonymous.¹² It imports a possession in fact by one having or claiming a freehold interest. Such a possession is known as a seizin in deed; while the right of immediate possession is a seizin in law; constructive seizin is also recognized as the legal equivalent of seizin in deed. (*Fenkins v. Fahey*, 73 N. Y. 362.)

Seizin denotes, ordinarily, a possession in fact by one having or claiming a freehold interest, which is known as a seizin in deed, or a right of immediate possession which is seizin in law. There may be a constructive seizin, the equivalent of a seizin in deed.¹³ It is quite evident that a remainderman, when the particular estate is a freehold, is not seized within this limited definition of the term; for he is not in possession, and has no right of possession. He cannot enter either to take the profits or to make livery of seizin to another.

Seizin is a technical term denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seizin or possession; or in law, when, after a descent, the person, on whom the land descends, has not actually entered, and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally in the seizin of the fee. But, in opposition to what may be termed the expectant nature of the seizin of those in remainder or reversion, the tenant in possession is said to have the actual seizin of the lands. The fee is intrusted to him. By any act which amounts to a disaffirmance by him of the title of

¹² *Cook v. Hammond*, 4 Mass. 488. *Mansfield*; *Coke Litt.* 17 a; *Green*

¹³ *Com. Dig.* A. 1, 2. *Per* *Ld. v. Liter*, 8 Cranch. 229.

those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee."¹⁴

Justice Story says in *Green v. Litter*, 12 U. S. (8 Cr.), 243, bk. 3, L. ed. 545, that "the object of the law in requiring actual seizin was to evince notoriety of title to the neighborhood and the consequent burthens of feudal duties. * * * But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry or gathering of a twig or acorn convey to civilized man at the distance of one hundred miles?"¹⁵

Livery of seizin imports a delivery of possession of lands, tenements and hereditaments, unto one entitled to the same. This was a ceremony used in the common law for the conveyance of real estate; and the livery was in deed, which was performed by the feoffor and the feoffee going upon the land, and the latter receiving it from the former; or in law, where the same was not made on the land, but in sight of it.¹⁶ In most of the States, livery of seizin is unnecessary, it having been dispensed with either by express law or by usage. The recording of the deed has the same effect. In Maryland, however, it seems that a deed cannot operate as a feoffment without livery of seizin.¹⁷

As to livery of seizin, the court, in *Holt v. Hemphill*, 3 Ohio, 232, say: "We have always held that a complete title may be created, without an actual entry, and where the grantee may never have been within hundreds of miles of the property granted. The delivery of the deed has been considered as giving possession, in contemplation of law, and the grantee is presumed to have entered, unless that presumption is

¹⁴ Hargrave's note, 217.

¹⁵ See *McDaniel v. Grace*, 15 Ark. 468; *Shores v. Carley*, 90 Mass. (8 Allen) 425; *Malone v. McLauren*, 40 Miss. 161; *Ferguson v. Tweedy*, 43 N. Y. 543; s. c. 56 Barb. (N. Y.) 168; *Gellespie v. Worford*, 2 Cald. (Ten.) 632; *Guion v. Anderson*, 8 Humph. (Tenn.) 298; *Davis v. Ma-*

son, 36 U. S. (1 Pet.) 503; bk. 7, L. ed. 239.

¹⁶ 2 Bl. Com. 315, 316.

¹⁷ 5 Harr. & John. 158; vide, 4 Kent Com. 381; 2 Hill Ab. c. 26, s. 4; 1 Mo. R. 553; 1 Pet. R. 508; 1 Bay's R. 107; 5 Harr. & John. 158; 2 Fairf. R. 318; *Dane's Abridgement*, h. t., and the article *Seisin*; 2 Bouvier's Law Dict. 80.

rebutted by facts. * * * And that I may not be misunderstood on this important point, I repeat that I do not consider a formal livery of seizin, as practiced in former times, or an actual corporeal entry, as being at all necessary to consummate a title, or to vest a seizin in deed, in any case where the premises are vacant, or occupied by a person holding under the grantor, or otherwise, without claim of title. In all such cases, the execution and delivery of the deed vests the seizin, completes the title, and puts the grantee in the same situation as if he had made a formal entry, and received the twig and turf from the hand of the grantor."

In the light of these decisions, and the considerations upon which they rest, we can hardly err in holding that the reason, or reasons, of the rule requiring seizin in deed, having no existence, the rule itself does not exist. And, certainly, the symmetry of our law demands this. It would be strange, indeed, and only lead to confusion and perplexity, if, while every other tenancy may be created without entry, or regard to the fact of adverse possession, a tenancy by the curtesy could not. Nor does a rule strongly commend itself to the good sense of men that makes the existence of the estate depend upon an almost, or quite, imaginary distinction between seizin in law and constructive seizin in deed. It is a mere fiction to say that a man is actually possessed of that which is in no one's possession, and it is plainly untrue to say so when the thing is in the possession of another. The reasoning of the courts in all these cases, if carried to its legitimate result, makes seizin in deed, either actual or constructive, wholly unnecessary; and this result is not in conflict with the principles of the common law. For even at common law a seizin in law is sufficient to give curtesy in all inheritances created without entry.¹⁸

§ 37. What constitutes disseizin. Disseizin, according to the definition given by Mr. Preston, "is the privation of seizin. It takes the seizin or estate from one man and places it in another. It is an ouster of the rightful owner of the seizin. It is the commencement of a new title, producing

¹⁸ 3 Bac. Abr. 12; Jackson v. Johnson, 5 Cow. 98; Ellsworth v. Cook 8 Paige, 643.

that change by which the estate is taken from the rightful owner and placed in the wrong-doer. Immediately after a disseizin, the person by whom the disseizin is committed has the seizin, or estate, and the person on whom this injury is committed has merely the right or title of entry. * * * As soon as a disseizin is committed, the title consists of two divisions; first, the title under the estate, or seizin; and, secondly, the title under the former ownership."¹⁹

Descents which take away entries are, when anyone seized by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir; in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by any summary method, but is driven to his action to gain a legal seizin of the estate. The right of entry may be tolled, or taken away by a descent cast, in cases of abatement, intrusion and disseizin.²⁰

Bouvier says that disseizin may be effected either in corporeal inheritances, or incorporeal. Disseizin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold; as if a man enters, by force or fraud, into the house of another, and turns, or at least, keeps him or his servants out of possession. Disseizin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession nor dispossession.²¹

It has never been held so far as the cases show, that mere words, or the taking of a deed of land without entry under it, can be considered as a disseizin. There must be some actual interference with the land, some actual physical assertion of dominion over it, to constitute what may be considered by the owner as a disseizin at his election.²²

¹⁹ Preston's Abst. 284.

²⁰ 3 Bl. Com. 176.

²¹ 3 Bl. Com. 169, 170; See 15 Mass. 495; 6 John. R. 197; 2 Watts, 23; 6 Pick. 172; 1 Verm. 155; 11 Pet. R. 41; 10 Pet. R. 414; 14 Pick. 374; 1 Dana's R. 279; 2 Fairf.

408, 11 Pick. 193; 8 Pick. 172; 8 Vin. Ab. 79; 1 Swift's Dig. 504; 1 Cruise, *65; Arch. Civ. Pl. 12; Bac. Ab. h. t.; 2 Supp. to Ves. Jr. 343; Dane's Ab. Index, h. t.; 1 Chit. Pr. 374, note r.

²² Towle v. Ayer, 8 N. H. 57.

The ancient rule that a disseisee cannot convey land was founded partly upon the peculiar nature of livery of seizin under the common law, and partly upon considerations of public policy. Sir William Blackstone states the rule to be "lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed."²³ In this country such reasons, if they ever existed, are of no practical moment and the modern tendency is to modify the ancient rule.²⁴ It is now ruled that such a conveyance is binding upon the grantor and that it entitles the grantee to recover the land in the name of the grantor but to his own use, even as against the disseizor.²⁵ In the case last cited the tenant held under a deed given to him when his grantor was disseized; but it was held that as he had entered and held possession under his deed, he could avail himself of his title in defence to a writ of entry, to avoid circuitry of action. In *University of Vermont v. Foslyn*, 21 Vt. 52, it was held that a deed by a disseisee was invalid only as to the person holding adversely at the time of the deed, or those who subsequently came in under him, but as to all other persons valid, and passed the title to the grantor. The same rule is recognized in New York.²⁶

This reasoning is impregnable. If a person who is disseized conveys land, and the disseizor abandons possession, and the grantee enters and occupies it, he acquires an indefeasible title. He thus acquires an actual seizin under a title which his grantor is estopped to deny, and a stranger who subsequently disseizes him cannot set up the invalidity of his title or rather of his deed.

If the disseizor abandons his possession, and the grantee does not enter into actual occupation, but allows the land to remain vacant there is no reason why the same result should not follow. Livery of seizin, so essential at common law, is no longer regarded. Delivery of the deed is now delivery of seizin unless the land is adversely occupied at the time. If it is, and the disseizor abandons his possession, it enures

²³ 2 Bl. Com. 290.

148; *Cleaveland v. Flagg*, 4 Church.

²⁴ *Sparhawk v. Bagg*, 16 Grey, 76.

583.

²⁵ *Farnham v. Peterson*, 111 Mass. 526.

²⁶ *Livingston v. Proseus*, 2 Hill,

to the benefit of the grantee and gives him a seizin, so that he has a title which is valid as against a stranger who subsequently disseizes him. This result is an obvious matter of justice and enforces no hardship to allow the grantee to bring action in his own name as the real party in interest, instead of resorting to the old fiction of a suit in the name of his grantor.

§38. **Effect of the word "heirs" in a grant in fee.** The word heir is, at common law, necessary to be used, if the estate is to be created by deed. A grant to a man and his right heirs is the same as a grant to a man and his heirs;²⁷ but Lord Coke, in Co. Litt. 8, b, says, that a grant to a man and his heir, in the singular number, conveys only an estate for life, because the heir is but one. This is a strange reason to be given, under a system of law which prefers males to females in the course of descent, and in which the right of primogeniture among the males is unrelentingly enforced. Mr. Hargrave, note 45 to Co. Litt. 8, b, questions the doctrine, and he says that there are authorities to show that the word heir, in a deed, as well as in a will, may be taken for *nomen collectivum*, and stand for heirs in general. The doctrine of Coke was very rigorously attacked by Lord Ch. J. Eyre, over a century ago, in *Dubber v. Trollope*, Amb. 453, and Lord Coke himself showed, in Co. Litt. 22, a, that an estate tail, with the word heir in the singular number, was created and allowed in 39 Ass. pl. 20.²⁸ Notwithstanding all this authority in opposition to the rule as stated by Lord Coke, and the unintelligible reason assigned for it, Mr. Preston states the rule as still the existing law.²⁹ In the case of *King's Heirs v. King's Adm.*, 15 Ohio, 559, a case distinguished for the most learned and elaborate discussion, the court held that the word heir in the singular number in a will, was to be construed the same as the word heirs. The limitation to the heirs must be made in direct terms, or by immediate reference, and no substituted words of perpetuity,

²⁷ Co. Litt. 22, b.

²⁸ See also *Richards v. Lady Berghavenny*, 2 Vern. 324; *Bawsey v. Lowdall*, Styles, 249; *Whiting v.*

Wilkins, 1 Bulst. 219; *Blackburn v. Stables*, 2 Ves. & Bea. 371.

²⁹ *Treatise on Estates*, vol. II, 8.

except in special cases, will be allowed to supply their place, or make an estate of inheritance of feoffments and grants.⁸⁰ The location of the word in any particular part of the grant is not essential; for a grant of a rent to A, and that he and his heirs should distrain for it, will pass a fee.⁸¹

That "heirs" or other appropriate word of perpetuity in a deed conveying land is essential to pass a fee simple estate is not a ruling admitting of no exception. When, for example, a mortgage evidences an intention to pass the entire estate as security, and express provisions cannot otherwise be carried into effect, the instrument will pass such an estate, although no formal words of perpetuity are employed.⁸² Where an estate is granted subject to some condition in the instrument creating it, or to some condition implied by law, to be thereafter performed it is called a "conditional fee." A determinable fee embraces all fees which are determined by some act or event expressed, in their limitation to circumscribe their continuance, or inferred by law as bounding their extent. In its broader sense, a "determinable fee" embraces what is known as a "conditional fee." Where it becomes an established fact that the event which may terminate the estate will never occur, a determinable fee enlarges into a fee simple absolute. So where the condition upon which a conditional fee rests has been performed, the estate becomes an "absolute fee."⁸³

Thus stands the law of the land, without the aid of legislative provision. But in this country the statute law of some of the States has abolished the inflexible rule of the common law, which had long survived the reason of its introduction, and has rendered the insertion of the word heirs no longer necessary. In Virginia, Kentucky, Mississippi, Missouri, Alabama and New York the word "heirs," or other words of inheritance, are no longer requisite, to create or convey an estate in fee; and every grant or devise of real estate made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or

⁸⁰ Litt. sec. 1.

⁸¹ Lord Coke, in 3 Bulst. 128;

4 Kent's Com. 5.

⁸² Brown v. National Bank, 44 Ohio St. 273.

⁸³ Fletcher v. Fletcher, 88 Ind. 420, Niblack, J.

interest appears in express terms or by necessary implication. In Illinois, words of perpetuity or inheritance are still essential to create a fee, and the same general rule is implied to a devise.³⁴ The statute of New York also adds, for greater caution, a declaratory provision, that in the construction of every instrument creating or conveying any estate or interest in land, it shall be the duty of the courts to carry into effect the intention of the parties, so far as such intention can be collected from the whole instrument, and is consistent with the rules of law.³⁵

Mr. Humphreys, in his *Essay on Real Property, and Outlines of a Code*, 235, first edition, has proposed the same reform, of rendering the word heirs no longer necessary in conveyances in fee; and the American lawyer cannot but be forcibly struck, on the perusal of that work, equally remarkable for profound knowledge and condensed thought, with the analogy between his proposed improvements and the actual condition of the jurisprudence of this country. But I think it very probable that the abolition of the rule requiring the word heirs to pass by a free deed, will engender litigation. There was none under the operation of the rule. The intention of the grantor was never defeated by the application of it. He always used it when he intended a fee. Technical and artificial rules of long standing, and hoary with age, conduce exceedingly to certainty and fixedness in the law, and are infinitely preferable, on that account, to rules subject to be bent every way by loose latitudinary reasoning. A lawyer always speaks with confidence on questions of right under a deed, and generally circumspectly as to questions of right under a will.³⁶

§39. Use of the word grant, estate, etc., and the effect of such use. By statute in several states all corporeal hereditaments, as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery, so that "grant" is now not only a sufficient, but a proper technical word of conveyance of any freehold estate and a simple deed of grant has superseded the old-fashioned feoffments,

³⁴ *Jones v. Bramblet*, 1 Scammon's Rep. 276.

³⁵ 4 Kent's Com. 7.

³⁶ 4 Kent's Com. 7-8.

leases and releases which were formerly required to convey freehold estates in possession. The word "grant," however, is not absolutely necessary in a deed of grant, for other words indicating an intention to grant will answer the purpose.³⁷ It is briefly defined as a generic term applicable to all transfers of realty.³⁸

By a grant everything passes which is necessary to the full enjoyment of the right, title or *estate* which is included in the words of a grant, but nothing more; so a grant of a mere right of way carries an easement only — the ownership of the soil not being essential to the free use of the right and in some instances the grant of an estate designated and described only by the particular use and purpose for which the land is appropriated, will be held to pass a fee.³⁹

"We hold it to be an incontrovertible rule that whenever an estate is given, either by deed or will, to a person generally or indefinitely, with an unlimited power of disposition annexed, it invariably vests an absolute fee in the first taker, and that neither a remainder nor an executory devise can be limited on such an estate."

Justice Johnson says in the case of *Lambert's Lessee v. Paine*, 7 U. S. (3 Cr.), 97, 130; bk. 2, L. ed. 377, 388, "I consider the doctrine as well established, that the word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by my or the, or followed by at or in, or in the singular or plural number. The intent with which it is used is the decisive consideration; and I should not feel myself sanctioned in refining away the operation of that intent by discriminations so minute as those which have been attempted at different stages of English jurisprudence. The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It is unquestionably true, that its meaning may be restricted by circumstances or expressions indicative of its being used in a limited or particu-

³⁷ Williams' Real Prop. 203; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 252; Barksdale v. Hairston, 81 Va. 765.

³⁸ 3 Wash. R. P. 181.

³⁹ Jamaica Pond Aqueduct Corporation v. Chandler and others, 91 Mass. 159, Bigelow, J.

lar sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject."

§40. Legal incidents of estates in fee. There are certain ineradicable features that characterize every estate in fee simple, and most prominent among those features is that of free alienation. Any attempt to fasten such conditions upon the estate, which in any way abridges the power of alienation is absolutely void. Such restraints are fundamentally hostile to the very nature and idea of a fee simple.⁴⁰ The integrity of the estate as a fee simple is annihilated by the intrusion of any principle that subverts the right of the owner to dispose of it unconditionally.

The language of the foregoing text may be subject to some modification in regard to partial restrictions affecting the future use of the property. And numerous instances may be adduced where the grantee, although taking an estate in fee simple, is obliged to observe the condition that the premises shall not be used for the distilling or vending of intoxicants or for hospital purposes, or like employments obnoxious to the peace and morality of the community. Another necessary incident of a fee simple estate is its liability to sale upon execution by the sheriff of the county in satisfaction of debts due from its owner.⁴² So, too, it is subject to the rights of dower and curtesy. But these topics are reserved for discussions in subsequent chapters. It should be added that their use, during the lifetime of the owner of the fee, may be forfeited for treason. See U. S. Const. art. 3, sec. 3, but it is customary to speak of the fee simple as an absolute estate in lands, an estate that is beyond the control of any limitation or condition whatever, and it must always be borne in mind that even this estate is subject to the paramount right of the State in the exercise of eminent domain.

⁴⁰ *McCleary v. Ellis*, 54 Iowa, 311; *Mandlebaum v. McDonnell*, 29 Mich. 78; *Walker v. Vincent*, 19 Pa. St. 369; *Depeyster v. Michael*, 6 N. Y. 467.

⁴¹ *Steines v. Dorman*, 25 Ohio St.

380; *Atlantic Dock Co. v. Lavitt*, 54 N. Y. 35; *Linzee v. Mixer*, 101 Mass. 512.

⁴² *Hayes v. Jackson*, 6 Mass. 149; *Sands v. Lindham*, 27 Gratt. 91.

No man's property can be held *absolutely* inviolate. It is not his to do with as he pleases in legal strictness, and repeated instances occur in which the State arbitrarily appropriates either all or a portion of his landed property for public purposes, while in doing this it incurs no further liability than is represented by the payment of such actual damages as the proprietor can show he had received. Again, there is an implied obligation on the part of every owner to so use his property as to avoid unnecessary loss and damage to his neighbor.⁴³

It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple, and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple, and becomes a fee subject to a condition.⁴⁴

In the case of *Mandelbaum v. McDonnell*, 29 Mich. 78; s. c. 18 Am. Rep. 61, decided by the Supreme Court of Michigan in 1874, it is declared that, "there never has been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law, and a condition of restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable and void." (Good prior to statute *quia emptores*.) In this case Justice Christiancy says that "At common law, however, prior to the statute *quia emptores*, a condition against alienation would in England have been good, because prior to that statute the feoffor or grantor of such an estate was entitled to the escheat on failure of heirs of the grantee, which was properly a possibility of reverter, and was treated as a reversion; so that the vendor did not, by the feoffment or conveyance, part with the entire estate; but this reversion, dependent on this contingency, remained in him and his heirs, which gave them an interest to insist upon the condition and take the benefit accruing to them upon the breach," and that "whether the statute *quia*

⁴³ *People v. Salem*, 20 Mich. 479.

⁴⁴ 4 Kent's Com. 5.

emptores ever became effectual in any of the United States by express or implied adoption, or as a part of the common law, we need not inquire, since it is clear enough that no such statute was ever needed in this State, if in any of the Western States, as no such right of escheat or possibility of reverter ever existed here in the party conveying the estate; but the escheat could only accrue to the sovereignty — the State. And, therefore, the question of the right to impose such conditions or restrictions stands here upon common law reasons, as it has stood in England since the statute in question.”

An estate in fee in land carries with it all metals and minerals thereunder, unless the metals and minerals are excepted in the conveyance or “have been before severed in ownership, and the right thereto vested in some other person.” The surface and the metals and minerals may be a distinct property from each other by separate conveyances from individuals.⁴⁶ Minerals in place are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both in such a case are land owners. They own separate and distinct corporeal hereditaments.⁴⁷

The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them, in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, of conveyance.⁴⁸

Also, by the severance, each estate is as distinct property in the respective owners as is the property in a two-story house, where the title to the lower story is in one person and the title to the upper story is in another person. An action of ejectment will lie in behalf of the owner of the surface to recover it; also an action will lie in behalf of the owner of the mineral estate to recover it; also the right of either owner may be barred by the statute of limitations.

By the policy of our laws it is of the very essence of an

⁴⁶ Bingham, Sales of Real Property, p. 288.

⁴⁷ Adam v. Briggs Iron Co. 7 Cush. 361.

⁴⁸ Caldwell v. Fulton, 31 Pa. 475.

estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force.⁴⁸

A conveyance of coal underlying land is not only a fee simple grant of the coal, but also of the space left after the removal of the coal. The tunnel, or shaft bore is, in other words, included in the fee⁴⁹ So the surface of the land may be separated from the different stratifications underneath, and there may be as many different owners as there are stratifications. (*Ib.*) These different ownerships may involve rights of access in the nature of an easement upon the land of the surface proprietor, who has made the first grant to other parties of sub-surface rights.⁵⁰ As the cases last cited have attracted considerable attention, I would especially invite attention to the concurring opinion of Judge Williams in the Mellon case, where these peculiar rights are elaborated in the most instructive manner.

It is familiar law that the owner of the surface may sell the right to mine beneath the surface, and again sell to others the right to bore for oil or gas under the coal stratum. In such instances, each has a way of necessity to reach his possession; the grantee of the coal owns the coal, but nothing else save the right of access to it. The estate is determinable upon the removal of the coal, and the estate so acquired owes a servitude of support to the surface. To accomplish this support of the surface, the proprietor of the coal stratum must leave pillars of sufficient size to prevent the caving in, or settling, of the land above his grant, and he is obliged in all respects, to observe the just rights of other owners above or below him. Such rights are corporeal hereditaments, and as such, the subjects of both legal and equitable cognizance.⁵¹

⁴⁸ See *Hobbs v. Smith*, 15 Ohio St. 419.

⁴⁹ *Lillebridge v. Lackawanna Coal Co.*, 143 Pa. St. 15.

⁵⁰ *Chartier's Block Coal Co. v. Mellon*, 152 Pa. St. 286.

⁵¹ *Lee v. Bungardner*, 86 Va. 315; *Chartier's Block Coal Co. v.*

The Pennsylvania courts have decided that a transfer of all the coal, in or under a given surface, even though taking the form of a lease, which is terminable at a fixed period, is in contemplation of law, and in matter of fact, a sale of the coal, and a valid grant of it in fee as a severed parcel of land. This doctrine is fully developed in *Sanderson v. Scranton*, 105 Pa. St. 472. It should be added that the doctrine so announced, is not free from doubt, and if decided to be of general application, it should be rigidly restricted to mineral leases. The argument by which the decision is sustained, is grounded upon those well recognized rules of interpretation which require such a construction as will effectuate the intent of the parties, wherever this can be done without violence to legal rules and maxims.

A grant of the exclusive right to take all the coal in a piece of land, without limit as to time, and coupled with an obligation to mine the coal or to pay for it if not mined, is a grant of an estate in fee in the coal as a separate parcel of land.⁶²

It has come to be the generally accepted doctrine in this country that a person who is owner of real estate, personal property or choses in action, or who has an interest therein may grant, convey or assign his right or interest, without the assent or acquiescence of any third person, and that the grantee or assignee will take, hold and enjoy the property so acquired in the same manner and with the like rights that his grantor or assignor had. The law has always been very liberal in permitting assignments of choses in action, and

Mellon, 152 Pa. St. 286; Pa. Gas. Co. v. Versailles Co., 131 Pa. St. 532.

⁶² Caldwell v. Fulton, 31 Pa. 475; 3 Morrison, Min. Rep. 238; Caldwell v. Copeland, 37 Pa. 427; 1 Morrison, Min. Rep. 189; Armstrong v. Caldwell, 53 Pa. 284; 13 Morrison, Min. Rep. 252; Clement v. Youngman, 40 Pa. 341; 5 Morrison, Min. Rep. 230; Kier v. Peterson, 41 Pa. 357; 8 Morrison, Min. Rep. 499; Scranton v. Phillips, 94

Pa. 15; 14 Morrison, Min. Rep. 48; Sanderson v. Scranton, 105 Pa. 469; Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583; 50 Am. Rep. 743; Woodward v. Delaware, L. & W. R. Co. 121 Pa. 344; Eley's Estate, 103 Pa. 300; Fairchild v. Fairchild (Pa.) April 25, 1887; Chester Emery Co. v. Lucas, 112 Mass. 424; 3 Morrison, Min. Rep. 343; Massot v. Moses, 3 S. C. N. S. 168; 16 Am. Rep. 697; 8 Morrison, Min. Rep. 607.

now permits the assignee to sue and recover thereon in his own name. The lessor of real estate may convey his reversion, and his grantee will be entitled to the rents accruing thereafter, or he may assign the reversion, reserving the rents, or assign the rents due and to become due. In either case when the rents are assigned, the assignee may sue and collect them in his own name under our statute.⁵³

Property is abandoned when it is thrown away or its possession is voluntarily forsaken by the owner — in which case it will become the property of the first occupant. To abandon land there must be a concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next comer, with an intention of not returning.⁵⁴

Forfeiture of estate, and corruption of blood, under the laws of the United States, and including cases of treason, are abolished.⁵⁵ Forfeiture of property, in cases of treason and felony, was a part of the common law, and may exist at this day in the jurisprudence of those States where it has not been abolished by their constitutions or by statute. But it is understood that there is at present no forfeiture in the United States for felony; and in only a few of the States for treason.⁵⁶

§ 41. The principle of involuntary alienation examined. Involuntary alienation. The celebrated case of *Brandon v. Robinson*, 18 Ves. 429, has been a prolific source of legal controversy both in England and in this country. In that case Lord Eldon, acting in the interests of the creditor class, formulated the doctrine that real property could not be so limited as to vest in one man for life without being subjected to the payment of his debts. This theory has had a partial recognition on this side of the Atlantic.⁵⁷ But the more humane policy of the New York statute law admits of inalienable trusts for the maintenance of the unfortunate. And the great case of *Nickols v. Eaton*, 91 U. S. 716, has seri-

⁵³ *Perrin v. Lepper*, 34 Mich. 292.

⁵⁴ *Jubsom v. Malloy*, 40 Cal. 310.

⁵⁵ Laws of U. S. of 1790, ch. 9, sec. 24.

⁵⁶ Vide, 2 Kent's Com. 386.

⁵⁷ See *Tillinghast v. Bradford*, 5 R. I. 206; *McIvain v. Smith*, 42 Mo. 45; *Hammersley v. Smith*, 4 Whart. (Pa.) 122; *Hallett v. Thompson*, 5 Paige, 583.

ously demoralized the Brandon decision of Lord Eldon. In an opinion of exceptional vigor, Mr. Justice Miller argues for the proposition that where the estate has been created for the benefit of another, and by the terms of the instrument so creating, it is expressly provided that the estate shall be free from any liability for the grantee's debts, creditors must respect this exemption. It will be readily conceded that it is the first duty of a parent or near relative to provide for those of his kindred who, from vicious habits or incurable disease, are in danger of becoming a charge upon the community. It will be also admitted that the estate so created comprises nothing which a creditor of the donee *originally* had any right to look to for indemnity — it represents no fund created from the property of the *debtor* — it is not the result of *his* thrift or self-denial, but comes entirely from an outside source, and there is neither justice nor good sense nor any requirement of public policy that should prevent the donor from hedging his benefaction with such safeguards as may best protect the improvident objects of his bounty from the greed of creditors. *Nichols v. Eaton* has been subjected to some very drastic criticisms from eminent specialists in the law, and it is still fashionable, in certain quarters, to refer to it with scant respect. The wind always howls loudest around the highest peaks. But we have sufficient confidence in the exalted character of the tribunal that pronounced that decision to believe that it will never recede from the rule it formulated. It is bottomed upon sturdy good sense, an element too frequently lacking, in judicial exposition, and the Anglo-maniacs who always see celestial marvels in the mere dictum of an English peer, must digest their spleen in the reflection, that other courts of last resort, in our various State jurisdictions, sanction and uphold the ruling of the Supreme Court of the United States.⁵⁸

§42. Instances of involuntary alienation. This term imports an alienation of property by judicial decree, under the sanction of which, real property is sold, usually by the sheriff

⁵⁸ See *Broadway Bank v. Adams*; *nett's App.* 46 Pa. St. 392; *Still v. Frazer v. Barnam*, 4 Greene, 316; *Spear*, 45 Pa. St. 168. *Pope v. Elliott*, 8 B. Mon. 56; Bar-

or a referee appointed for the purpose, in order to satisfy the claim of some judgment creditor. The subject is only alluded to in this connection, as it more properly appertains to "title acquired by execution," extended treatment of which will be found at page . Perhaps we should add that proceedings, under the power of eminent domain, afford an apt illustration of this particular species of alienation. The term is used in contradistinction of what is commonly recognized as a pure volitional act — one to which the party fully and freely consents, without being moved thereto by some judicial process. Blackstone enumerates four distinct methods of alienation, or common assurances: 1, by deed; 2, by matter of record; 3, by special custom; and 4, by devise. (2 Bl. Com. c. 20.) In this country, the power of alienation is not a necessary incident to a life estate in real property, whether the interest is legal or equitable.⁵⁹ Instances of involuntary alienation frequently occur in cases where real property has been sold for unpaid taxes and a sheriff's deed has issued after the period of redemption to the purchaser of the tax certificate.⁶⁰

§ 43. Who may be freeholders. When it is considered that all investiture of property is the direct result of some contractual relation existing between grantor and grantee, we

⁵⁹ Nichols v. Eaton, 91 U. S. 725.

⁶⁰ Alienation is any method whereby an estate is voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties. (2 Bl. Com. 287.) An act whereby one man transfers the property and possession of lands, tenements, or other things, to another. (Boyd v. Cuddeback, 31 Ill. 119 [1863]; 1 N. Y. 48.) A transfer short of a conveyance of the title is not an alienation of an estate. (Masters v. Madison County Ins. Co., 11 Barb. 630, 629 [1852];

Absolute alienation is a transfer of realty without condition or qualification. Conditional alienation is a transfer of realty made to rest upon some event yet to happen, or upon some act yet to be done; as a covenant to convey an estate. (See condition.) Blackstone describes four modes of alienation or transfer of title to real estate which he calls "common assurances;" by matter *in pais* or deed; by matter of record in the courts; by special custom; by devise. (United States v. Schurz, 102 U. S. 397 [1880]; 2 Bl. Com. 294.) Cited from Anderson's Law Dict.

shall have no difficulty in determining the question, who may be freeholders. In a general sense all persons are capable of holding real estate. Theoretically, it may be claimed, that even persons *non compos* possess this capacity. And in the broadest equitable sense, there are but few instances where the disability is of so serious a character as to exclude the right of possessing property. Both law and equity at all times favor the free interchange of property as comporting with our instincts as a free and commercial people, and there is no record of any legislation that has attempted to abridge or restrict this right. A vendor is never required to inquire into the mental status or social status of his vendee, and the law would indulge a presumption of the perfect sanity of all persons as one of natural condition.

It is only where the mental condition of the vendee is openly and obviously trenching upon a state of utter irresponsibility, that the contract by which he becomes a freeholder may be avoided. This subject will be critically examined further on. But here it is sufficient to remark that such avoidance is based upon a violent presumption of fraud, on the part of the vendor or grantor. Even infancy, which forms a sufficient plea, in many instances, for the annulment of a contract, is, as regards a freeholder, an unavailing plea, because the law assumes that some species of estate is absolutely essential to his welfare.

A broad generalization is usually subject to the criticism of inaccuracy, and perhaps is not calculated to meet every conceivable case, and hence, when it is asserted that all persons are capable of holding freehold estates or estates in fee, it must be understood that there are a few exceptions. Under the common law alienage was conspicuously one of those exceptions, but on this side of the Atlantic this disability has almost entirely disappeared, through the influence of express legislation. The Massachusetts statute goes so far as to declare that non-resident aliens may take land by descent.⁶¹ And in New York the extreme limit of comity is reached by declaring that the children of a resident alien inherit his real estate interest on his death intestate, as legal heirs; although they

⁶¹ Lumb v. Jenkins, 100 Mass. 527.

are themselves non-resident aliens.⁶² In a few jurisdictions, however, the common law rules in this respect are still enforced.⁶³

In regard to corporations the rule is universal in this country that they may take, hold and dispose of real estate, for any purpose whatever not inconsistent with their charter rights that may advance or facilitate the object of their creation.⁶⁴

a. *Incidents of corporate ownership.* The corporation is clothed everywhere with the charter and the powers given to it by the statute creating it, where its existence is recognized by State comity.⁶⁵

The rule firmly established by authority is, that a corporation of one State can take and hold lands in another State by purchase or mortgage, when consistent with its charter, and not prohibited by positive law.⁶⁶

The capacity of a foreign corporation to take and hold title to real estate cannot be raised collaterally. Such a question can only be made in behalf of the State in a direct proceeding.⁶⁷

In the case of *Ramsey v. Ins. Co.*, 55 Ill. 314, the court uses this language: "It is the settled rule, that a party who has contracted with a corporation *de facto*, is never permitted to

⁶² Goodrich v. Russell, 42 N. Y. 177; Luhrs v. Eimer, 80 N. Y. 171.

⁶³ Crane v. Reader, 21 Mich. 24.

⁶⁴ Ketchum v. Buffalo, 14 N. Y. 356.

⁶⁵ Bk. v. Earle, 13 Pet. 519; Story, Conf. L. (2d ed.), secs. 37, 38; Head v. Prov. Ins. Co., 2 Cranch, 127; Root v. Godard, 3 McLean, 102; Hayden v. Davis, Id. 276.

⁶⁶ Note to 2 Kent's Com. (12th ed), 283; Lumbard v. Aldrich, 8 N. H. 31; Libbey v. Hodgdon, 9 N. H. 396; State v. R. R. Co., 25 Ver. 433; Lathrop v. Bk., 8 Dana (Ky.), 114; Bk. v. North, 4 Johns. Ch. 370; Baird v. Bk., 11 Serg. & R. 411; Thompson v. Swoop, 24 Pa. 474; Am. Bible Society v. Marshall.

15 Ohio St. 537; Leazure v. Hillegas, 7 Serg. & R. 313; Fairfax v. Hunter, 7 Cranch, 603; Runyan v. Coster, 14 Pet. 123; Bk. v. Montgomery, 2 Scam. 423; Merrick v. Van Santvoord, 34 N. Y. 214; Bk. v. Godfrey, 23 Ill. 579; State v. Sherman, 22 Ohio, 433; Page v. Heineberg, 40 Vt. 81; N. Y. Dry Dock v. Hicks, 5 McLean, 111; Farmers' Loan & Trust Co. v. McKinney, 6 McLean, 1; Henriques v. Dutch West India Co., 2 Ld. Raym. 1533.

⁶⁷ Haugh v. Cook Co. Land Co. 73 Ill. 23; People v. Mauran, 5 Den. 399; Page v. Heinberg, 40 Ver. 81; Brown v. Phillipps, 16 Iowa, 210.

allege any defect in its capacity to contract or sue. All such obligations, if valid, are duly available on behalf of the sovereign power of the State."⁶⁸

Where there is a right in the grantee to take and hold land for any purpose, if there is a capacity in the vendor to convey, there is a complete sale as soon as the conveyance is made, and if the corporation in purchasing violates or abuses the power to do so, that does not concern the vendor or his heirs; it is a matter between the State and the corporation.⁶⁹

Even if the society was unincorporated, so that it would have no legal capacity to take by deed, the grantor and his heirs are estopped by the covenant of warranty from questioning the capacity of the grantee.⁷⁰

The power of a foreign corporation to hold lands in the State of Illinois has been denied by its highest judicial authorities. The Supreme Court has held that "A corporation created in another State for the sole purpose of buying and selling lands, has no power to purchase and hold the title to lands in this State, as it is against the general policy of our legislation on the subject of domestic corporations, and would tend to create perpetuity; that it is well settled that a corporation created in our State cannot exercise its functions in another State or sovereignty, without permission of the latter, express or implied; that the right to such exercise of its functions depends upon comity, and that such comity is inadmissible when contrary to its policy or prejudicial to its interests."⁷¹

The principles above enunciated were afterwards, by the same court, fully recognized and affirmed in *Starkweather v. Am. Bible Society*, 72 Ill. 55.

⁶⁸ *Stone v. Oil Co.*, 41 Ill. 85; *Bradley v. Ballard*, 55 Ill. 414; *Bowen v. Cross*, 4 Johns. Ch. 373; *Glass Co. v. Dewey*, 16 Mass. 94; *Smith v. Sheeley*, 12 Wall. 361; 79 U. S. XX. 431.

⁶⁹ *Chambers v. St. Louis*, 29 Mo. 576; *Grant, Corp.* 113; *Doe, ex dem. Hayne v. Redfern*, 12 East.

96; *Myers v. Croft*, 13 Wall. 295; 80 U. S. XX. 563; *Laud v. Hoffman*, 12 Am. Law Reg. (N. S.), 146.

⁷⁰ *Terrett v. Taylor*, 9 Cranch. 43; *Carver v. Jackson*, 4 Pet. 1; *Big. Estop.* 276; *Buckingham v. Hanna*, 2 Ohio St. 558.

⁷¹ *Carroll v. E. St. Louis*, 67 Ill. 568.

The principle thus established has become a rule of property, and will be recognized by the courts as such.⁷²

The State courts will follow State rulings though unsettled, taking the last decision as their guide.⁷³

b. *Domicile of corporation.* Although, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States. "Its residence in one State creates no insuperable objection to its power of contracting in another."⁷⁴ If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden." In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest court.

⁷² *Beauregard v. New Orleans*, 18 How. 497, 59 U. S., XV, 469; *Pease v. Peck*, 18 How. 595, 59 U. S., XV, 518; *Congdon v. Goodman*, 2 Black, 574, 67 U. S., XVII, 257; *Gardner v. Collins*, 2 Pet. 58.

⁷³ *Dred Scott v. Sandford*, 19 How. 393, 60 U. S., XV, 691; *Leflingwell v. Warren*, 2 Black, 599, 67

U. S., XVII, 261; *Williams v. Kirtland*, 13 Wall. 306, 80 U. S., XX., 683; *Walker v. State Harbor Comrs.* 17 Wall. 650, 84 U. S., XXI, 744; *Strader v. Graham*, 10 How. 82; *Jackson v. Chew*, 12 Wheat. 153; *Christy v. Pridgeon*, 4 Wall. 196, 71 U. S., XVIII, 322.

⁷⁴ *Runyan v. Coster*, 14 Pet. 122.

c. *Rights of foreign corporations.* In *Carroll v. E. St. Louis*, 67 Ill. 568, the question before the court was, whether the Connecticut Land Company, a corporation created in another State for the sole purpose of buying and selling lands, had power to purchase and hold title to lands in the State of Illinois. The decision was that it could not, for the reason — and no other is assigned — that if the company were permitted to exercise its functions in Illinois to the full extent authorized by its charter, it could acquire lands without limit as to quantity, and hold them in perpetuity; that such privileges had never been accorded by Illinois to her own domestic corporations, and were inconsistent with her settled public policy against perpetuities; as indicated not by direct express enactment, but with absolute certainty, by the general course of its legislation from the very organization of the State.

Two of the judges dissented from the opinion, so far as it held invalid a transfer of land by the corporation to a purchaser.

The subsequent case of *Starkweather v. Bible Society*, 72 Ill. 50, involved the title to certain real estate, an undivided interest in which was devised by one Starkweather to the trustees of the American Bible Society, established in 1816, to have and to hold the same for its use, but not to be entitled to the same, or its income, until his youngest child became of age. The claim of the Bible Society was denied by the court, upon the following grounds: 1, That by the laws of New York, as declared by the highest court of that State, it had not the capacity to take title to real property in New York by devise; 2, That New York had no power to create a body incapable of taking land in that State by devise, and yet with power to so take lands in a foreign jurisdiction; 3, And by way of argument, that if New York was to so enact, and other States were to so consent, then such bodies might so receive and hold lands; but, said the court, the former had not so enacted, nor had Illinois so consented, since, when the will of Starkweather was probated, September 16, 1867, there was no statute of Illinois which authorized foreign corporations to hold lands by devise in that State; 4, The principles announced in *Carroll v. E. St. Louis* were regarded as

conclusive against the claim of the Bible Society, "as," said the court, "all of the inconveniences and injuries are as likely to ensue in this, and other cases like it, as in that;" 5, The devise being illegal and void, the court could not decree a sale of the real estate devised and direct the payment of the proceeds to the society.

§ 44. Federal legislation on the subject of alienage. By Congressional enactment in 1888, Congress placed itself on record in positive and unequivocal terms in regard to a very essential feature of alien holdings, as will be seen from the subjoined text. Nothing but the chronic inertia of the Attorney-General's department interferes with some very spirited litigation. It will be observed that the restrictions apply to the territories only and to the District of Columbia, but the scope of this restrictive legislation will be more clearly apprehended when we consider that similar enactments are now in force in many of the Western States.

An act of Congress, approved March 3, 1887 (24 St. L. 476), provides that it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created. Provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer.

Sec. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall here-

after acquire or hold or own any real estate hereafter acquired in any of the Territories or of the District of Columbia.

Sec. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes, shall acquire, hold, or own more than five thousand acres of land in any of the Territories; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by Act of Congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

Sec. 4. That all property acquired, held, or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this act mentioned.

Aliens who become *bona fide* residents may, in most of the United States, inherit real property. In some jurisdictions they are required to declare their intention to become citizens, and this intention is usually evidenced by some set formula duly subscribed and sworn to. In four of our States, (Illinois, Iowa, Kansas and Texas), full naturalization is required, time being given for that purpose.

Rights of non-resident aliens by treaty. Treaty stipulations with foreign countries quite generally provide for the holding of lands by non-resident alien heirs for a specified term (usually three years), during which they can effect a sale of the property, and remove the proceeds. They have, during this period, in all essentials, the co-extensive rights of resident heirs, and they are held to take the fee, which is, however, determinable by the non-exercise of the power of

sale within the three years specified. Non-resident aliens can bring a partition suit to enforce their respective rights, and comprehensively it may be said, that in all particulars, the remedial measures of our courts may be invoked to secure any relief necessary to the preservation of their just rights.¹⁵ It should be added, that all treaty stipulations entered into by the federal department of State, and formally ratified, become by virtue of the federal Constitution, the supreme law of the land, effectually superseding all local statutes that contravene in any particular the recitals of the treaty.

§ 45. When fee is in abeyance—Views of Judge Dixon.

A fee or freehold is said to be in abeyance when there is no person *in esse*, in whom it can rest and abide. Though the law considers it as always potentially existing, when a proper owner appears. It is a maxim of the common law that a fee cannot be in abeyance. The maxim rests upon reasons that have no existence, and it is not now of universal application. Even where it still applies, it must yield to a statutory provision inconsistent with it—as the confiscation act of 1862; and it appears that the franchise of a corporation may be in abeyance—or a grant of land to a charity. In this category also are all property rights of a bankrupt, until final adjudication.¹⁶

The exigencies of tenure required that the seizin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seizin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seizin, and to preserve it for the successors in the title.¹⁷

This rule had important effects upon the creation of freehold estates; for it followed, as an immediate consequence of the rule, as also from the nature of the essential act of con-

¹⁵ Schultz v. Schultz, 144 Ill. 290; Kull v. Kull, 37 Hun, 476.

¹⁶ Anderson's Law Dict., Title Abeyance. Citing Wallach v. Van Reswick, 92 U. S. 212; Dartmouth College v. Woodward, 4 Wheat.

691; Town of Paulet v. Clark, 9 Cranch. 332; Bank v. Sherman, 101 U. S. 406.

¹⁷ Co. Lit. 342, b; Butler's Note, Ib; see 1 Hayes Conv. (5th ed.), 12, 14.

veyance by livery of seizin, that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval. "Livery of seizin must pass a present freehold to some person and cannot give a freehold *in futuro*." "If a man makes a lease for life to begin at Michaelmas it is void, for he cannot make present livery to a future estate, and therefore in such case nothing passes."⁷⁸

If a conveyance be made to A for life, the remainder to the heirs of B then living, and livery be made to A, Mr. Fearne contends that the inheritance continues in the grantor, because there is no passage open for its transition at the time of the livery. The transition itself may rest in abeyance or expectation, until the contingency or future event occurs to give it operation; but the inheritance, in the meantime, remains in the grantor, for the very plain and unanswerable reason that there is no person in *rerum natura* to receive it; and he or his heirs must be entitled, on the determination of the particular estate, before the contingent remainder can take place, to enter and resume the estate. He treated with ridicule the notion that the fee was in abeyance, or *in nubibus* or in mere expectation or remembrance, without any definite or tangible existence, and he considered it as an absurd and unintelligible fiction.⁷⁹

That an estate in abeyance is to be considered as *in nubibus*, was a doctrine frequently suggested and admitted in Plowden (29 a, 35 a, 556, 563, 564), and Lord Coke, in Co. Litt. 342 b, said, that an estate placed in such a nondescript situation, had the quality of fame; *inter nubila caput*. Such an occasional glimpse at fairy land, serves at least to cheer us amidst the disheartening gloom of the subject.⁸⁰

The argument is of a piece with that kind of reasoning once employed to prove that titles to estates were "in abeyance," "*in nubibus*" and "*in gremio legis*," the folly of which is so thoroughly exposed and exploded by the severe and searching logic of Mr. Fearne, in his admirable treatise on Remainders. It was held, in case of a lease to one person for life, remainder to the right heirs of another still living, that no estate

⁷⁸ Co. Lit. 217, a; 5 Co. 94, b;
Barwick's Case.

⁷⁹ Fearne on Remainders, 452-458.

⁸⁰ 4 Kent's Com. 290.

remained in the grantor; and because there was no heir, for the reason that no one can be heir during the life of his ancestor, but only after his death, and because the tenant took only a life estate, the remainder was said to be in abeyance, in the clouds, or in the bosom of the law. These opinions were founded upon the very same assumption as that of Justice Ventris, namely, that the remainder passed out of the donor at the time of livery, and consequently that no estate remained in him thereafter; and because the title must always be somewhere, the advocates of the doctrine sent it to the clouds; "though," says Mr. Fearne, "by some sort of compromise between common sense and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object beside hard and hardly intelligible words, for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place, entitles the grantor, or his heirs, to enter and reassume the estate."

The questions are so closely allied, and the substrata of the two follies are so exactly alike, that Mr. Fearne's reasoning is fully in point. And it is certainly refreshing, after a perplexing and vain effort to understand that which never was and never will be intelligible, to take up an author, who, like Mr. Fearne, treats the subject upon the principles of common sense. He intimates a conviction, that instead of the title to estates being in the clouds, there is a much stronger possibility of *caput inter nubilia condit*, of the head of the inventor of the fiction having been buried or hidden in them. He says: "I cannot but think it a more arduous undertaking, to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles as well of common law as of common sense, a suspension of the complete, absolute operation of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence." The same is true of the delivery of a deed to a third person for the use of the grantee, without his

knowledge or previous direction. It is far more compatible with common law and common sense, to say that its operation is suspended until the happening of the event indispensable in the law to its validity, namely, an acceptance by the grantee, than to make the law perform the wonderful exploits of vesting and recalling the title contrary to its best settled and soundest principles.⁸¹

In many of its essential details this entire undertaking may be regarded as an amplification of the legal principles that underlie estates in fee simple. The meagre treatment of the topic, in this immediate connection, results from the attempt to avoid reiterations, and develope the entire science of the law tributary to the subject within the compass of one compact volume. By consulting the elaborate index, the practitioner will readily discern the scope and nature of related topics, and have no difficulty in finding whatever may legitimately appertain to a full discussion of the many ramifications and incidentals that accompany an estate in fee.

⁸¹ Welch v. Sackett, 12 Wis. 243.

CHAPTER IV.

ESTATES IN FEE TAIL.

SEC. 46. Definition.

47. Origin and history.
48. Classification, general and special ; tail male and tail female.
49. How created.
50. Incidents to a tenancy in tail.
51. Rules of construction.
52. What property is subject to entailment.
53. Rules for barring the entail. Taltarum's case.
54. Statutory regulations on this subject.
55. Duty as to taxes, etc.
56. Estates tail will support both curtesy and dower.
57. The rule in Shelley's case.
58. Scant recognition of this estate in America.
59. Views of Chancellor Kent.

§ 46. Definition. An estate in fee tail (generally termed an estate tail, is an estate of inheritance which a man has, to hold to him and the heirs of his body, or to him and particular heirs of his body. (1 Steps. Com. 228.) It is an estate of inheritance by force of the statute *De donis*, limited and restrained to some particular heirs of the donee, in exclusion of others.¹

This estate is otherwise described as having many of the attributes of an estate of inheritance.² The cases last cited are both Massachusetts decisions, and that jurisdiction seems to retain some lingering fondness for this all but obsolete species of estate.

Estates tail, therefore, to quote Mr. Washburn's definition, "are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his

¹ 2 Crabb's Real Prop. 22, 23, sec. 971; Cruise's Dig., tit. ii, ch. 1, sec. 12; Burrill's Law Dict.

² See 2 Prest. Est. 453, and an in-

teresting discussion of the subject in Wight v. Thayer, 1 Gray, 287, and Hall v. Thayer, 5 Gray, 523.

grandchildren, in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the death of the first owner without issue, the estate determines.”

An estate tail is an estate given to a man and some particular description of his heirs, to the exclusion of all other heirs. It was originally treated as a fee simple, upon condition that the grantee had the required heirs; and, accordingly, as soon as the condition was performed, by the birth of the specified heirs, the estate became absolute. But as this construction tended to defeat the design of creating the estate — which was to tie up the property from alienation, and create a perpetuity in particular families — the aristocracy of England had influence enough to procure the enactment of the famous statute *de donis conditionalibus*, the effect of which was to fetter an estate tail, with the ancient restraints upon alienation. The estate was to go to the stipulated heirs at all events, if there were such; and if not, to revert to the donor.⁴

§47. **Origin and history.** The expression “fee tail” was borrowed from the feudists, among whom it signified any mutilated or truncated inheritance, from which the heirs general were cut off; being derived from the barbarous verb *tiliare*, to cut; from which the French *tailler*, and the Italian *tagliare*, are formed. In a word, a fee tail is really a lesser estate of inheritance, cut or carved out of a fee simple. If I give land to a man and the heirs of his body, this is an estate tail, for here I explain the general import of the word “heirs” to the descendants of the body of the donee. Estates tail have no practical existence in the United States, and in some of the States they are wholly unknown.⁵

The early English judges, in their mode of constructing conditional fees, gave great offense to the landed aristocracy who were exceedingly solicitous for the rights of strict entailment and primogeniture, as the most effectual means of sustaining the grandeur and importance of the privileged

³ 1 Washb. on Real Prop, 99; 2 Prest. Est. 360; Williams on Real Prop. 43, 44.

⁴ Walker's Am. Law, p. 351.

⁵ Tyler on Ejectment, 48.

classes, and preventing the free alienation of landed property. To restrain this tendency on the part of the judges, and to effect ulterior purposes as well, they procured the enactment of the celebrated statute "*de donis conditionalibus*," technically known as the statute of Westm. 2, 13 Edw. I, C. 1, but familiarly referred to as the statute "*de donis*."⁶ The judicial interpretation of this statute was to the effect that where an estate was limited to a man and the heirs of his body, the donee should no longer receive a conditional fee, which became absolute the instant issue was born, but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a fee tail, and vesting in the donor the ultimate fee simple of the land expectant on the failure of issue, which expectant estate we now call a "reversion." And hence it is that tenancy in fee tail is by virtue of the statute *De donis conditionalibus*.⁷ It was upon the construction of this statute that estates in fee tail were instituted. It was held that the donee no longer had a conditional fee simple but a particular estate which they denominated a fee tail as above stated. As the word heirs is necessary to create a fee, so "body" or some other word of procreation is necessary to create a fee tail.⁸ Estates tail general exist where lands and tenements are given to one and the heirs of his body begotten. Estates tail special exist where the gift is restricted to certain heirs of the donee's body as "to the heirs of his body, to be begotten by his present wife."

§48. Classification, general or special; tail male and tail female. Estates tail are either general or special.

Tail general is where lands and tenements are given to one and the heirs of his body begotten; which is called tail general, because how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate tail, *per formamdoni*.⁹

Tenant in tail special is where the gift is restrained to cer-

⁶ See Co. Litt. 21.

⁸ 2 Bl. Com. 114.

⁷ 13 Edw. I, A. D. 1286, chap. 1;

⁹ Litt. sec. 14, 15.

² Bl. Com. 112.

tain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. One is, where lands and tenements are given to a man, and the heirs of his body, on Mary his now wife to be begotten. Here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife, and therefore it is called special tail. And here we may observe that the words of inheritance (to him and his heirs) give him an estate in fee, but they being heirs to be by him begotten, this makes it a fee tail; and the person being also limited, on whom such heirs shall be begotten (viz., Mary, his present wife), this makes it a fee tail special.¹⁰

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail male or tail female. As if lands be given to a man, and his heirs male of his body begotten, this is an estate in tail male general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And in an entail male, the heirs female shall never inherit, nor any derived from them; nor *è converso*, the heirs male, in case of a gift in tail female.¹¹ Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate tail, for he cannot deduce his descent wholly by heirs male.¹² And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates tail, the one in tail male, and the other in tail female; and he hath issue a daughter, which daughter hath issue a son, this grandson can succeed to neither of the estates, for he cannot convey his descent wholly either in the male or female line.¹³

§49. How created. The words "heirs of the body" or "heirs lawfully begotten of the body" are appropriate to create an estate tail, and it is well settled that their use or an equivalent expression are words of limitation to be construed as creating such an estate in the absence of any other words in the conveyance, from which it can be reasonably

¹⁰ See Litt. sec. 16, 27, 28, 29.

¹¹ Litt. sec. 21, 22.

¹² Litt. sec. 24.

¹³ 1 Inst. 25; Jacob's Law Dict.

inferred that they were not used in their technical sense."¹⁴ An instrument will not be construed to create an estate tail, if it will allow any other construction without destroying the language.¹⁵

So long as there are heirs in tail capable of taking by the form of the gift, there can be no limitation over to heirs general. The very nature of an estate tail is, that it is an estate of inheritance limited to a particular class of heirs; the legal construction put on it is, that it divides the inheritance, or general estate in fee, making a particular estate to the donee in tail and the special heirs, and leaving an estate in the donor, which he may limit over, by way of remainder, and which without such limitation will revert to the donor or his general heirs.¹⁶ It has been said, upon the authority of Lord Coke (Co. Litt. 21, a.), that when a person, in the premises of a deed, gives land to another and the heirs of his body, *habendum* to him and his heirs forever, he will take an estate tail, with a fee simple expectant. In tracing this proposition, it will be found to be this: When it is manifest by the premises that the donor intends to give an estate tail, and from the subsequent parts of the deed it is equally manifest that he intends to give ultimately an estate in fee, it will operate as a grant of a present estate tail, with a fee simple expectant. But expectant upon what event or contingency? Clearly, upon the determination of the particular estate, the estate tail, by the failure of heirs in tail, which is its own proper limitation. It operates by way of gift of the particular estate in tail, with a limitation over, by way of remainder, to the general heirs of the same donee in fee. Of course, such remainder over in fee cannot take effect until the failure of issue in tail. It is a question of intent, upon the particular terms of the deed or will. It sometimes happens, that where there is clearly a gift in tail in the premises, and the *habendum* is to heirs generally, without saying "heirs of the body," the subsequent words will be qualified by the preceding, and "heirs," though not expressly qualified in the *haben-*

¹⁴ See True v. Nicholls, 2 Duvall, 547; Brann v. Elgey, 83 Ky. 440; Asher v. McCarty, 2 Ky. Law Rep.

¹⁵ Breckenridge v. Denny, 8 Bush. 527; Tucker v. Tucker, 78 Ky. 503.

¹⁶ 2 Inst. 335.

dum will be limited and qualified by what went before, and be held to mean "heirs of the body."¹⁷

A devise to a person during his natural life, and, if he leaves lawful issue, to such issue, but in case of his dying without issue, or they dying under twenty-one years, then to another, gives an estate tail. The word "issue" is a limitation.¹⁸

As the word "heir" is necessary to create a fee, so in farther limitation of the strictness of the federal donation, the word "body," or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate tail. As, if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, his heirs.¹⁹ So, on the other hand, a gift to a man, and his heirs, male or female, is an estate in fee simple, and not in fee tail, for there are no words to ascertain the body out of which they shall issue.²⁰ Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by any words which show an intention to restrain the inheritance to the descendants of the devisee.²¹

Further, as to the effect of particular words in creating estates tail.

If lands are given to the husband and wife, and to the heirs of their bodies, both of them have an estate in special tail; by reason of the word heirs, for the inheritance is not limited to one more than the other. Where lands and tenements are given to a man and his wife, and to the heirs of the body of the man, the husband hath an estate in general tail, and the wife an estate for life; as the word heirs relates generally to the body of the husband. And if the estate is made to the

¹⁷ Buxton v. Uxbridge, 10 Met.

90.

¹⁸ James' Claim, 1 Dall. 47 (Sup. Ct. Pa.)

¹⁹ 1 Inst. 20.

²⁰ Litt., sec. 31; 1 Inst. 27.

²¹ 1 Inst. 9, 27; see title Will.

husband and wife, and to the heirs of the body of the wife by the husband begotten; there the wife hath an estate in special tail, and the husband for term of life only; because the word heirs hath relation to the body of the wife, to be begotten by that particular husband. If an estate be limited to a man's heirs which he shall beget on his wife, it creates a special tail in the husband; but the wife will be entitled to nothing, etc.²²

Lands given to a man and woman unmarried, and to the heirs of their bodies, will be an estate in special tail; for they may marry.²³ And though lands are given to a married man and another man's wife, and the heirs of their two bodies, it may be a good estate tail, for the possibility of their intermarrying.²⁴

A general tail, and a special tail, may not be created at one and the same time; if they are, the general, which is greater, will frustrate the special.²⁵

It is the word "body," or other words amounting to it, make the entail; and a gift to the heirs male, or heirs female, without anything further, is a fee simple estate, because it is not limited of what body. And hence a corporation cannot be seized in tail.²⁶

§ 50. Incidents to a tenancy in tail, under the Stat. Westm. 2, are chiefly these: 1, A tenant in tail may commit waste on the estate tail, by felling timber, pulling down houses, or the like, without being impeached or called to account for the same; 2, The wife of the tenant in tail shall have her dower, or thirds, of the estate tail; 3, The husband of a female tenant in tail may be tenant by the curtesy of the estate tail; 4, An estate tail may be barred, or destroyed, by a fine, by a common recovery, or by lineal warranty descending with assets to the heir.²⁷

The establishment of this family law (as the statute *de donis* is properly styled by Pigott), has occasioned, from time to time, infinite difficulties and disputes. Children grew dis-

²² Litt., sec. 26, 28; Co. Litt., 22, 26.

²³ 1 Inst. 25; 10 Rep. 50.

²⁴ 15 Hen. 7.

²⁵ 1 Inst. 28.

²⁶ 1 Inst. 13, 20, 27; Jacob's Law Dict.

²⁷ 1 Inst. 224; 10 Rep. 38.

obedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under color of long leases, the issue might have been virtually disinherited. Creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth. Innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full. And treasons were encouraged, as estates tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm.²⁸ But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and, therefore, by the connivance of an active and political prince, a method was devised to evade it.²⁹

An estate tail may, no doubt, be subject to an executory devise over on some condition or event to take effect in abridgment or derogation of it. (1 Preston on Abstracts, 401.) Though such an executory devise can be destroyed by a common recovery suffered by the tenant in tail, which enlarges his estate into a fee, and excludes all subsequent limitations, whether in remainder or by the way of springing use or executory devise.³⁰ This destructibility deprives any limitation after an estate tail of all objection on the score of tending to create a perpetuity, however remote may be the event on which it is limited to vest.³¹ A devise over after an estate tail on a definite failure of issue is not an executory devise, but a remainder; for it takes effect, not in derogation or abridgment of the preceding estate, but on its regular determination, though only in the event of the determination of the estate upon the death of the tenant. This

²⁸ Co. Litt. 19; Moor, 156; 10 Rep. 38.

²⁹ 2 Com., c. 7; Jacob's Law Dict. (Ed. 1811.)

³⁰ 2 Preston on Estates, 460; 1 Preston on Abstracts, 401; 4 Kent's Com. 13.

³¹ Lewis on Perpetuities, 663.

remainder has been authoritatively settled as vested,³² though the principle of that determination had been very seriously questioned.³³

As late as 1854 Shaw, C. J. says, in *Wight v. Thayer*, 67 Mass. 284, that estates tail, with their legal incidents, have been too long and too often recognized by the comonwealth to be now questioned.³⁴ And the law of descent in Massachusetts by force of which children all take equally "limits the rule to estates in fee simple," and does not abrogate the common law in regard to estates tail. An estate tail, though created and brought into existence by deed or will, is still an estate of inheritance, and when once vested, and until barred, passes like other estates of inheritance by opinion of the law. And though it is competent for a devisor to create as many particular estates as he will to hold in succession, yet it is not competent for him to alter the rules of law which govern the descent of an estate, either in fee or in tail, which has once vested as an estate tail. So long as there are heirs in tail capable of taking by the form of the gift, there can be no limitation over to heirs general.

§51. Rules of construction. It is an established rule of law in Massachusetts that a devise to one, and, if he die without heirs of his body, then over to another, creates an estate tail in the first taker, whatever the actual intention of the testator may have been; but words qualifying such a devise, which show that the testator had in mind a definite failure of issue on the decease of the first taker, and made provision for that, will defeat such a construction.³⁵

Whether words importing a failure of issue of him to whom an estate is first given import an indefinite failure of issue, or a definite failure at the death of the first taker, determines what estate has been given to him. It is only when they should receive the former construction that an estate tail is created. So a devise to one, and if he die without

³² *Smith v. Parkhurst*, 18 Viner's Abr. 413; 4 Bro. P. C. 353.

³³ *Smith on Executory Interests*, 116; *Taylor v. Taylor*, 63 Pa. St. 481.

³⁴ See *Davis v. Hayden*, 9 Mass. 514; *Corbin v. Healey*, 20 Pick. 514; *Buxton v. Uxbridge*, 10 Met. 87.

³⁵ *Schmaunz v. Goss*, 132 Mass. 141.

heirs of his body, then over to another, would create an estate tail in the first taker, without reference to the testator's intent. But such qualification of the devise as would conclusively show that the testator had the failure of issue distinctly in mind, would prevent such a construction.³⁶

In *Hulburt v. Emerson*, 16 Mass. 241, the devise was to the testator's son John, his heirs, executors and assigns, subject to the payment of a legacy, but in case John should leave no male issue, then one-half to be equally divided among his children, and the other half equally among all the surviving children of the testator. This was held to give John an estate in tail male, with contingent remainders over; and that the surviving children were such as should be living whenever John died without male issue. No reasons are given by the court for the latter opinion, nor authorities cited to support it; and the heirs of the children who survived the testator, but did not survive John, were not parties to the suit. But read in this connection *Pennington v. Pennington*, 60 Md. 418.

As it is probable that very few testators desire to create an "estate tail," the following points may be of some service, particularly in avoiding the creation of such an estate. An estate tail may be created as follows:

1. By a devise to one and his issue, whether they are or are not issue of the devisee living at the date of the will or at any other period.³⁷

2. By a devise to one and the heirs of his body.³⁸ So a devise to the testator's son W, and his oldest male heir forever.³⁹

3. By a devise to one and his children, he having no children at the time; it being equivalent to him and his issue.⁴⁰

4. By a devise to one, and if he dies without issue (or words of similar import) then over to another in fee, the

³⁶ *Schmaunz v. Goss*, 132 Mass. 141.

³⁷ 2 Jarmin on Wills, 329.

³⁸ *Wight v. Thayer*, 1 Gray, 284; *Hall v. Thayer*, 5 Id. 523; *Buxton v. Uxbridge*, 10 Met. 87; *Malcomb v. Malcomb*, 2 Cush. 472; *Welde v. Williams*, 13 Met. 486.

³⁹ *Cuffee v. Milk*, 10 Met. 389; see *Canedy v. Haskins*, 13 Id. 389.

⁴⁰ *Nightingale v. Burrell*, 15 Pick. 104; *Wheatland v. Dodge*, 10 Met. 502; see, however, *Wight v. Baury*, 7 Cush. 105.

devise over, "looks to an indefinite failure of issue, and therefore cannot take effect as an executory devise, but the first devisee in fee is cut down by the subsequent devise, to an estate tail, and the subsequent devisee takes an estate in remainder. The same rule of construction applies when the first devise is to two persons, and the devise over, in case of the death of either, leaving no issue, is not to the survivor."⁴¹

§ 52. What property is subject to entailment. The familiar principles of equitable conversion referred to in a preceding chapter regard money, under certain conditions, as real estate, and in such cases it may form the *corpus* of an entailed estate.⁴² And, as a general proposition, all grades of incorporeal property that savor of the realty may be the subject of entail.⁴³ It will be observed that personal property held distinctively as such, is not within the principle of the statute *de donis*, and cannot claim the privilege of entailment.

§ 53. Rules for barring the entail. Taltarum's Case. A curious procedure invented by the old English judges in the time of the Plantagenets, has come down to us in the year-books of that period under the title of Taltarum's case. The design was to ignore the provisions of the statute *de donis*, or rather to obviate the effects of it, through the medium of a fictitious action at law, based upon some fair semblance of the facts, and nominally contested by one of the parties in interest. The nominal defendant in this solemn farce, after duly appearing, and filing an answer, suddenly vanishes like an exhalation; whereupon the woosack goes through the farce of entering a judgment by default. With this as a basis the court proceeded to award the estate to the person entitled. It is doubtful if ever since the beginning of recorded time a more idiotic farce was ever enacted under the ægis of the law. Heathen Rome, in the zenith of its abuse of judicial process, never adopted so childish a fiction as the means to an end. The zealots who still descry celestial marvels in the English common law, would do well to employ their energies in defense of this and kindred mon-

⁴¹ School Fund, 102 Mass. 262; Parker v. Parker, 5 Met. 134; Hall v. Priest, 6 Grey, 18.

⁴² In re Miller, 48 Cal. 165; Craig v. Leslie, 3 Wheat. 563.

⁴³ 2 Bl. Com. 113.

strosities. Even English veneration for the antique, and deification of precedent, proved unable to sustain this rank iniquity, and it has been abolished by statute. But not until it had pestered the minds of American law students, and fastened itself upon the legal nomenclature under the euphonious name of "conveyance and fine by common recovery." It will ever stand as a monumental exhibit of human stupor, legal pedantry, a senseless piece of circumlocution adopted chiefly to mystify and bewilder an ignorant age.

A tenant in tail actually seized of lands, may by a deed, bar the entail and convey the land in fee simple.⁴⁴ But *a life tenant alone* cannot do this.⁴⁵

When the right of entry or of action of a tenant in tail, or of a person entitled to a remainder in tail, is barred, the estate tail and all remainders and reversions expectant thereon shall also be barred, as fully as they might have been by a conveyance made by the tenant in tail.

But in Massachusetts, the remainder in tail is not liable for the debts of the remainder-man.⁴⁶ And under statute of 1791, ch. 60, a tenant in tail may convey by deed an individual part of the estate tail.⁴⁷ As to descent of estates tail in Massachusetts, see *Wight v. Thayer*, 1 Gray, 284. Equitable estates tail may be conveyed and remainders barred as in the case of legal estates, and the grantee may call for a conveyance of the outstanding legal estate.⁴⁸

Wherever estates in fee tail have any recognition in this country, it will be found that the old form of conveyance by fines and common recoveries has given place to a more simplified method. The nonsense of instituting a fictitious suit for the purpose of making a conveyance must be patent to all, and is one of the innumerable instances in which the old common law secured *justice* through interminable mazes of *injustice*. What wonder that the great master of the rolls,

⁴⁴ *Wilson v. O'Connell*, 147 Mass. 17.

⁴⁵ *Holland v. Cruft*, 3 Grey, 162; *Whittaker v. Whittaker*, 99 Mass. 364; *Allen v. Trustees, etc.*, 102 Mass. 262.

⁴⁶ *Holland v. Cruft*, 3 Gray, 162.

⁴⁷ *Hall v. Thayer*, 5 Gray (Mass.), 523.

⁴⁸ Statutes of Mass., 1851, ch. 14.

Sir George Jessel, in speaking of these rules of entailment was moved to say: "The law is founded on the extraordinary caprices of ancient real-estate lawyers, and it is impossible to find the principle upon which a decision is founded or whether there is any principle at all."

§ 54. Statutory regulations on this subject. Sec. 15. A person actually seized of land as a tenant in tail may convey such lands in fee simple by a deed in common form, in like manner as if he were seized thereof in fee simple; and such conveyance shall bar the estate tail and all remainders and reversions expectant thereon.

Sec. 16. When lands are held by one person for life with a vested remainder in tail in another, the tenant for life and the remainder may convey such lands in fee simple by their deeds in common form, in like manner as if the remainder had been limited in fee simple; and such deed or deeds shall bar the estate tail and all remainders and reversions expectant thereon.

Sec. 17. Equitable estates tail, in possession or remainder, and all remainders or reversions expectant thereon, may be barred in the same manner as legal estates tail and the remainders and reversions expectant thereon.

Sec. 18. The person to whom an equitable fee simple is conveyed pursuant to the preceding section shall upon request therefor be entitled to a conveyance of the outstanding legal estate from the person in whom such legal estate is then or thereafter vested in trust.⁴⁹

§ 55. Duty as to incumbrances, taxes, etc. A tenant in tail occupies a position similar to that of a life tenant so far as regards the payment of tax assessments, ordinary repairs, and interest on incumbrances. His interest in the property itself is considerably restricted, and it would hardly comport with a refined sense of justice to compel him to discharge a preexisting debt, or make himself liable for some permanent improvement, either or both of which would accrue to the advantage of the remainder-man or to the heir in tail.

§ 56. Estates tail will support both curtesy and dower. The statute *de donis*, the enactment of which created estates

⁴⁹ Chap. 120, Mass. R. S. 1882.

tail, is silent as to the rights of dower and curtesy in such an estate. But judicial construction soon fastened such rights upon it, and statutory enactment in this country, at least, has not in any way interfered with the right.⁶⁰

§ 57. **The rule in Shelley's case.** Estates tail are subject to the rule in Shelley's case; but, as an extended analysis of that celebrated rule will be found under the chapter on Remainders a discussion of its merits in this particular connection would seem undesirable.

§ 58. **Scant recognition of this estate in America.** The doctrine of entailment is utterly repugnant to the spirit of our institutions, and in those few jurisdictions where estates tail are still tolerated, instances of their creation are very rare. The constant tendency in judicial circles is toward the discouragement of their application, and the readiness of our courts to entertain any scheme for avoiding them renders the entire subject of little practical importance. They may be barred by fine and common recovery, or by deed. And the estate is generally limited to the first taker, while the remainder carries the fee simple absolute.

There is very decisive condemnation of estates tail in the statutory law of many of the States. Quite generally words which ordinarily, under the statute *de donis*, would raise an estate tail, are now construed to establish a fee simple, or at most, an estate for life in the first donee, with a remainder in fee simple to his children.⁶¹ In Kentucky remedial legislation has made short work with this vexatious problem, and the enactment now in force provides that "All estates heretofore or hereafter created, which in former times would have been deemed estates in tail, shall henceforth be held to be estates in fee simple."

Happily, estates tail have been rare in this country. They were introduced here before the revolution, but were so manifestly opposed to the spirit of our Republican institutions, which favor a free distribution of property, that most, if not all the States, have altogether prohibited them.

⁶⁰ *Mandlebaum v. McDonnell*, 29 Mich. 78. 2, sec. 3; N. J. R. S., tit. Descent, sec. 11.

⁶¹ See N. Y. R. S., Pt. 2, c. 1, tit.

Estates tail are not favored, and the presumption is against the intention to create them, and the presumption must be overcome by language free from ambiguity.⁵² The estates can be in any way limited to any persons, but such as are in being at the time, and their immediate issue or descendants; and all estates attempted to be entailed, become absolute fees in the issue of the first grantee in tail. Thus, by a statute of ten lines, while the dead are prevented from domineering over their posterity, by means of restraints upon their property, the students of law are relieved from investigating this extensive and intricate branch of English jurisprudence.⁵³

§ 59. Views of Chancellor Kent. The doctrine of estates tail, and the complex and multifarious learning connected with it have become quite obsolete in most parts of the United States. In Virginia, estates tail were abolished as early as 1776; in New Jersey, estates tail were not abolished until 1820; and in New York, as early as 1782, and all estates tail were turned into estates in fee simple absolute.⁵⁴ This is so construed as to include estates tail in remainder.⁵⁵ So, in North Carolina, Kentucky, Tennessee, and Georgia, estates tail have been abolished, by being converted by statute into estates in fee simple.⁵⁶

Entails are also prohibited in Florida (Thompson's Digest, p. 191); in Texas, by the State Constitution (art. 1, sec. 18); and are no longer recognized in Wisconsin where estates heretofore entailed are now regarded as allodial.⁵⁷ In the States of South Carolina and Louisiana, they do not appear to be known in their laws, or ever to have existed; but in

⁵² *Collins v. Collins*, 40 Ohio State, 353, 363.

⁵³ Walker's Am. Law, p. 351.

⁵⁴ Act of Virginia of 7th October, 1776; acts of Assembly of New Jersey, 1784, 1786 and 1820; R. S. N. J., 1847; *Den v. Robinson*, 2 South. 713; *Den v. Spachius*, 1 Harrison's Rep. 172; Laws of New York, ses. 6, c. 2, ses. 9, c. 12; New

York Revised Statutes, vol. I, 722, sec. 3.

⁵⁵ See *Van Rensselaer v. Kearney*, 11 How. U. S. 297.

⁵⁶ Act of North Carolina, 1784; Act of Kentucky, 1796; Griffith's Reg., under the appropriate heads; No. 8 Prince's Dig. of the Laws of Georgia, 1837, pp. 231, 246.

⁵⁷ Revised Statutes of Wis., 1849, ch. 56, secs. 3, 4.

several of the other States, they are partially tolerated, and exist in a qualified degree. The Civil Code of Louisiana, art. 1507, prohibits substitutions and *fidei commissa*. It is more rigorous than the Code Napoleon. In New Hampshire estates tail are said to be retained, but I should have inferred from statutes passed in 1789, 1791, and 1792, respecting conveyances by deed and by will, and the course of descents, that estates tail were essentially abolished. But it was not so, for by statute in 1837, any tenant in tail, in New Hampshire, may convey by deed his estate, and bar all remainders and reversions as effectually as by a fine or common recovery. But it was held in *Jewell v. Warner*, 35 N. H. 176, that the statute *de donis* was impliedly repealed by the statutes of 1789, and that, consequently, estates tail no longer exist in New Hampshire. So a tenant for life, with the person having a vested remainder in tail, may by deed convey the whole estate, as if the remainder was in fee simple. In Alabama and Mississippi, a man may convey or devise land to a succession of donees then living, and to the heirs of the remainder-man.⁵⁸ But this provision seems to have been omitted in the last revision of the Alabama Code, and estates tail whenever created are converted into fees simple.⁵⁹ In Connecticut⁶⁰, and in Vermont, Ohio, Illinois, and Missouri, if an estate tail be created, the first donee takes a life estate, and a fee simple vests in the heirs, or person having the remainder after the life estate of the grantee, or first donee in tail.⁶¹ This is also the case in New Jersey by the Act of 1820. (Elmer's Dig, 130.) The estate on the death of the tenant for life vests in his children, though difficulty has been suggested to exist if the grantee has no children, or their issue.⁶² The tenant in tail in those states, is in realty but a tenant for life without the power to do any act to defeat or encumber the estate in the hands of the heir or person in

⁵⁸ Statute of Alabama, 1812.

⁵⁹ Alabama Code of 1852, sec. 1300.

⁶⁰ Kirby's Rep. 118, 176, 177; Hamilton v. Hempstead, 3 Day, 332; Swift's Dig., vol. I, 79; Allyn v. Mather, 9 Con. Rep. 114.

⁶¹ Revised Statutes of Vermont,

1839, p. 310; Statutes of Ohio, 1831;

Statutes of Connecticut, 1784; Ib. 1821; Ib. 1838; Revised Laws of Illinois, 1833; Revised Statutes of Missouri, 1835.

⁶² Griffith's Reg.

remainder. In Indiana a person may be seized of an estate tail, by devise or grant, but he shall be deemed seized in fee after the second generation.⁶³ But entails are now abolished in Indiana, by the Revised Statutes of 1852, vol. i, p. 238. In Connecticut there may be a special tenancy in tail, as in the case of a devise to A, and to his issue by a particular wife. The estate tail, in the hands of the issue in tail, as well special as general issue, male or female, is enlarged into an estate in fee simple. In Rhode Island, estates tail may be created by deed, but not by will, longer than to the children of the devisee, and they may be barred by deed or will. Estates tail exist in Maine, Massachusetts, Delaware, and Pennsylvania, subject, nevertheless, to be barred by deed, and by common recovery, and in two of these States by will, and they are chargeable with the debts of the tenant.⁶⁴ A fee simple passes on a judicial sale to satisfy a charge. This is so decided in one of those States, and the same consequence must follow in all of them, when the land is chargeable with debt.⁶⁵ In Maryland, estates tail general, created since the Act of 1786, are now understood to be virtually abolished, since they descend, and can be conveyed, and are devisable, and chargeable with debts, in the same manner as estates in fee simple. Docketing estates tail by common recovery had been previously abolished by statute in 1782, and they were to be conveyed as if they were in fee.⁶⁶

Estates tail were introduced into this country with the other parts of the English jurisprudence, and flourished in full vigor until the Revolution, which, in effect, by destroying all titles of nobility in the United States, swept away the chief incentive to the maintenance of this species of estates, and they are now practically obsolete in this country, and in most of the States have been abolished by legislative enactments, as above outlined.

⁶³ Revised Statutes of Indiana, 1838, 238.

⁶⁴ Dane's Abr., vol. IV, 621; Lithgow v. Kavenagh, 9 Mass. Rep. 167, 170, 173; Nightingale v. Burrell, 15 Pick. 104; Corbin v. Healy, 20 Id. 514; Statutes of Mass., 1791, c. 60; Mass. Revised Statutes, 1836, part 2,

c. 50; Jackson on Real Actions, 299; American Jurist, vol. II, No. 4, 392; Purdon's Dig. 353; Riggs v. Sally, 15 Maine Rep. 408.

⁶⁵ Gause v. Wiley, 4 Serg. & Rawle, 509.

⁶⁶ Kent's Com. 13.

CHAPTER V.

ESTATES FOR LIFE.

SEC. 60. Definition and nature.

61. How created and classified.
62. Estates *pur autre vie*.
 - a. How created.
 - b. Incidents of this estate.
 - c. How determined.
63. How created by operation of law.
64. Right to emblements.
65. Right to reasonable estovers.
66. Incidents of life estates.
67. Life estates with power of disposition.
68. The doctrine of waste as applied to life tenancies.
69. "Praying in aid."
70. Rule as to taxes, incumbrances, etc.
71. Adverse possession as between life tenant and reversioner.
72. Possession of the muniments of title.
73. Termination of life estate.
74. Rule as to surrenders.
75. Value of life estate, how computed.
76. The doctrine of merger examined.

§ 60. **Definition and nature.** In contemplation of law a life estate ranks next to an estate in fee. There is no logical reason why this should be so, as an estate for years — nine hundred and ninety-nine years, for instance — would approach nearer to our ideals of a fee simple than an estate for life. However, it is not our province to quarrel with a classification, that has the sanction of immemorial usage, and I shall proceed to consider estates for life as a higher dignity, in the law of real property, than any possible estate for years. It is an estate of freehold coupled with the right of alienation — to reasonable estovers — and to all emblements. It is created either by express act of the parties or by operation of law. It can never be an estate of inheritance.

This term imports a vested right in realty conditioned upon one or more lives. They naturally bisect themselves

into conventional life estate and legal life estates. The former is always created by act of the parties; the latter by operation of law. Legal life estates comprise tenancy in tail, after possibility of issue is extinct; tenancy in curtesy, tenancy in dower. Conventional life estates comprise an estate for the term of the grantee's own life; an estate for the life of another or the lives of others. That for another's life is the lowest species of freehold. A grant not fixing the term nor mentioning heirs is construed a life estate; so is an estate held on the uncertain contingency that it may possibly last for life. And so also is a conveyance to a woman so long as she remains a widow, or during coverture; or as long as one shall live in a certain house or place; or till a sum be paid out of the income of an estate.¹

§ 61. How created and classified. Life estates are, in contemplation of law, either conventional or legal, and they may be created by deed or grant under which method they are regarded as properly conventional life estates. Their other mode of creation, as we have seen in the previous section, is by arbitrary action at law. Estates for life may be created not only by express words, but also by a general grant without defining or limiting any specific estate. As, if one grants to A B, the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance, or heirs, mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large or a grant for term of life generally, shall be construed to be an estate for the life of the grantee; in case the grantor hath authority to make such a grant; for an estate for a man's life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires.

¹ 2 Bl. Com. 120.

As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.²

It is not opposed to any rule of law to create a life estate, with power to sell and convey, and limit a remainder after its determination. Indeed it is a very common incident in this grade of estate.³

§ 62. Estates "*pur autre vie*." Estates for life fall into two classes: 1, those created by operation of law; and, 2, those created by act of the party. In the first class we may catalogue dower, curtesy, tenancy in tail, and homestead estates. In the second class estates are either for the life of the grantee, or some other person, the latter known as "*estates pur autre vie*."

Such estates are frequently termed a descendible freehold, but such a designation is glaringly inaccurate as it is not an estate of inheritance.⁴ It only endures for the life of some particular person other than the grantee, and is the least valuable form of life estate. In some jurisdictions it degenerates into a chattel real, on the death of the grantee or devisee, although during his lifetime it has reached the dignity of a freehold. It has many of the characteristics of personal estate, and may be devised by a will. They are of rare occurrence in this country, but occasionally appear wher-

² 2 Bl. Com.

³ 3 Hamlin v. United States Exp. Co. 107 Ill. 443; Rountree v. Talbot, 89 Id. 249; Brownfield v. Wilson, 78 Id. 467; Peoria v. Darst, 101 Id. 609; Bland v. Bland, 103 Id. 11; Henderson v. Blackburn, 104 Id. 227; 44 Am. Rep. 780; Bergan v. Cahill, 55 Ill. 160; Friedman v. Steiner, 107 Id. 125; Smith v. Bell, 31 U. S., 6 Pet. 68, 8 L. ed. 322; Burleigh v. Clough, 52 N. H. 267, 13 Am. Rep. 23; Morford v. Dieffen-

backer, 54 Mich. 593; Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684; Smith v. Taylor, 21 Ill. 296; Willis v. Watson, 5 Id. 64; Caruthers v. McNeill, 97 Id. 256; Johnson v. Johnson, 98 Id. 564; Jones v. Bramblet, 2 Id. 276; Heuser v. Harris, 42 Id. 425; People v. Jennings, 44 Id. 488; Holiday v. Dixon, 27 Id. 33; Pool v. Blakie, 53 Id. 495; Markillie v. Ragland, 77 Id. 98; Nicoll v. Scott, 99 Id. 531.

⁴ Mosher v. Yost, 33 Barb. 77.

ever a tenant, for his own life, conveys his estate to a third person.

a. *How created.* There is but one⁵ method of creating the estate, viz., by the life tenant assigning or conveying his interest to a third person. This is literally all there is of it, and momentary reflection will conclusively establish the infrequency of the estate. Here is a life interest depending upon the frail and uncertain tenure of natural breath. At any instant the tenancy may be annihilated, and the reversioner invested with his rights. Under the most favorable auspices then, the tenure is exceedingly dubious. Few would care to purchase it, and if there are no purchasers, syllogistic reasoning will say there are no sellers. In fact, the reports on this side of the Atlantic are conspicuously silent on the subject of estates *pur autre vie*. They have occurred, and they will, doubtless, occur again. But it is not a subject that is capable of much expansion.

b. *Incidents of the estate.* It is the lowest estate of freehold, not of inheritance, that a man can have, and Chancellor Kent denies it any descendible qualities.⁶ Under the old common law, if the owner died before the man for whose life it was held, it was regarded as a vacant or abandoned estate, and any stranger was permitted to take possession by way of special occupancy. Our laws are intolerant of such nonsense. Logic and reason would suggest that under the statute of distribution, the heirs of the deceased owner would be entitled to the unexpired term.⁷

Generally, we may say, with reference to the estate *pur autre vie*, that in scope and nature it had all the attributes of a conventional life estate; no more, no less. The owner cannot commit waste, he must keep down the taxes, make ordinary repairs. He must do all that the remainder-man can reasonably expect of the *cestui qui vie*. In this country it

⁵ Some text writers mention three distinct methods of raising the estate. My authority for asserting the single method is Judge Samuel J. Treat, who asserts that 50 years' experience at the bench and bar

has convinced him that the other methods would not be countenanced under our present laws.

⁶ 4 Kent's Com. 27.

⁷ 2 Bl. Com. 258; see Walker Am. Law, 275.

is largely regulated by statute." And in several States it is regarded as a chattel interest, and hence will not pass to the heir of the deceased owner, but constitutes an asset in the hands of the executor or administrator. It is hardly necessary to add that the estate terminates with the death of the *cestui qui vie*.⁹

c. *How determined.* It is very generally settled law in this country that in a devise of real property the presumption will be indulged, in the absence of any direct language to the contrary, that the intention was to create an estate in fee simple. This rule directly antagonizes the old common law regulations affecting the subject, and is more in harmony with the growing hostility for estates clogged by some technical limitations that debase the purity of the fee. Estates hampered by a condition are not easily alienable, and our policy has always been to favor the free transmission of landed property.

As we have observed the death of the *cestui qui vie* operates as a determination of this species of estate. It cannot survive the personality of its creator. And, although it is not a chattel interest, still, in the language of Lord Kenyon, "It partakes somewhat of the nature of personal estate, though it still remains a freehold interest for many purposes. And a will to dispose of it must always be attested under the statute of frauds."¹⁰ Kent says it is a freehold estate *sub modo*, even in the hands of the executor or administrator of the former owner.¹¹

§ 63. **How created by operation of law.** Dower and curtesy are the only species of life estates that are created by operation of law. In all other instances they spring into being through some act of the parties. But when created by law, it is through the pitiless operation of some statute that arbitrarily gives to some person a life estate. All publicists, from the earliest times, have regarded marriage as the mainspring of the social fabric, and that relation has come to be highly favored in the law. Both dower and curtesy are incidents of

⁹ See 1 N. Y. Rev. Stat. 722.

¹⁰ Doe v. Linston, 6 Tr. 291.

¹¹ See Clark v. Owens, 18 N. Y.

¹¹ See Roseboom v. Van Vechten, 5 Den. 424.

this relation, and are given as life estates by the law in all cases where one survives the other — dower to the wife, where she survives the husband, and curtesy to the husband where he survives the wife. As both these species of life estates are made the subject of extended treatment further on, it will be unnecessary in this immediate connection to pursue the subject.

§ 64. **Right to emblements.** It is a well settled rule of public policy, grounded upon the most obvious principles of equity, that a man who is diligent in seed time, should be rewarded in harvest. That one who has planted should be given the opportunity to reap, and hence it is a rule of extended application, that a tenant for life whose estate is for any reason terminated through some act which it was impossible for him to foresee, may gather the crops which he has sown.¹² For similar reasons the law will sanction his right of entry upon the premises that he may remove the crops harvested during his term, and which have been either stacked upon the field or sheltered in a barn or cellar.¹³

Generally it may be said that the right to emblements applies only to "*fructus industriales*," and in many localities, by customs and uses, the tenant for life may exercise the privilege of removal. From the foregoing text it follows by necessary implication that the tenant for life, having sown the crop, in good faith, and with no warning as to the termination of his tenancy, has a right, at all reasonable hours, and in all reasonable ways, to enter upon the land and cultivate the crop sown, and to harvest the same when it has reached maturity.¹⁴

This right to emblements is conceded only to those whose tenure is uncertain and dependent upon some contingency, such as tenants for life or at will; or is unexpectedly determined before harvest, by the act of God or of the law, and

¹² King v. Fowler, 14 Pick. 238; Whitmarsh v. Cutting, 10 Johns. 361; Chesley v. Welsh, 37 Me. 106; Stewart v. Doughty, 9 Johns. 108.

¹³ Willey v. Conner, 44 Vt. 68; Clark v. Harvey, 54 Pa. St. 142.

¹⁴ Humphries v. Humphries, 3 Ired. 362; Harris v. Frink, 49 N. Y. 24; but see Henderson v. Cardwell, 9 Baxt. 389.

without fault on the part of the tenant, as by death, or by notice to quit.¹⁶ If his tenure is so uncertain that he cannot know when he sows whether it will continue until he shall reap, the tenant is entitled to emblements; otherwise not.¹⁶ The custom of the country or locality where the lease is made, however, sometimes enters into the contract, and gives emblements to lessees whose terms are certain; but custom will prevail only where the contract is silent or uncertain, and there is no express covenant.¹⁷

If a lease contains no reservations, the tenant is entitled to remove all the crops harvested during his term.¹⁸ A lease terminable in the spring of any year, in case the farm is sold, is practically one at will, and the tenant is entitled to a crop of grain sown by him in the fall.¹⁹ So, also, where the lease terminates absolutely in the spring, if the tenant sows wheat in the fall in pursuance of a stipulation in his lease, or by direction of his landlord.²⁰

Undertenants are entitled to emblements and have a right to the possession so far as is necessary to preserve and gather them.²¹

On grounds of public policy if the tenancy was in full force at the time of planting, a tenant at will or for life is entitled to ingress and egress to secure the fruits of his labor.²²

By the term emblements is understood the crops growing upon the land. By crops is here meant the products of the earth which grow yearly and are raised by annual expense and labor, or "great manurance and industry," such as grain; but not fruits which grow on trees which are not to be planted yearly, or grass, and the like, though they are annual.²³ It is a general rule, that when the estate is termi-

¹⁶ Oland's case, 5 Coke, 116 b; Stewart v. Doughty, 9 Johns. 108; King v. Fowler, 14 Pick. 238; Kingsbury v. Collins, 4 Bing. 207.

¹⁶ Id.; Whitmarsh v. Cutting, 10 Johns. 361.

¹⁷ Stultz v. Dickey, 5 Binn. 285; Demi v. Bossler, 1 Penn. 224; Idplings v. Nagle, 2 Watts & S. 22.

¹⁸ Willey v. Conner, 44 Vt. 68; Clark v. Harvey, 54 Penn. St. 142.

¹⁹ Pfanner v. Sturmer, 40 How. Pr. (N. Y.) 401.

²⁰ Kelley v. Todd, 1 W. Va. 197; Armstrong v. Bicknell, 2 Lans. (N. Y.) 216; Van Doren v. Everitt, 2 South. (N. J.) 460.

²¹ Bevans v. Briscoe, 4 Har. & J. (Md.) 139.

²² Samson v. Rose, 65 N. Y. 411.

²³ Co. Litt. 55, b; Com. Dig. Biens, G; Ham. Part. 183, 184.

nated by the act of God in any other way than by the death of the tenant for life, or by act of the law, the tenant is entitled to the emblements; and when he dies before harvest time, his executors shall have the emblements, as a return for the labor and expense of the deceased in tilling the ground.²⁴

§ 65. The right to reasonable estovers. The term estovers is one of frequent occurrence in connection with the correlative term emblements. It merely signifies the right which a tenant for life or for years has to the use of sufficient firewood, and fencing and repairing material belonging to the reversioner, and which is found upon the premises by the tenant. In this country the question is somewhat regulated by custom and usage, but may be restrained in all cases by positive agreement.²⁵ All regulations on the subject are simply declaratory of this, that he is entitled to nothing more than is necessary to the reasonable enjoyment of the estate. It should be added that the term estovers is synonymous with the homely old compounds "house bote," "hay bote," and "plough bote" and "stone bote."²⁶

§ 66. Incidents of estates for life. The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion,²⁷ and it is settled law that the rents of an open mine are income, and go to the tenant for life.²⁸ The latter two cases also rule that, when land is chiefly valuable for coal mining purposes, although the mines are unopened the power to lease the real estate includes the power to lease the coal lying under the surface. A life tenant of land, whereof the timber is the intended source of profit may cut it for profit.²⁹ Where the mines are severed from the surface, the ordinary rules respecting waste have no application.³⁰

²⁴ 1 Bouvier's Law Dict.

²⁵ 4 Paige, 174; 2 Hill, 157.

²⁶ Smith v. Jewett, 40 N. H. 532;
2 Bl. Com. 35.

²⁷ Shoemaker's App., 106 Pa. 392;
Westmoreland Coal Co.'s App., 85
Pa. 344; Kier v. Peterson, 41 Pa.

357; Neel v. Neel, 19 Pa. 323; Irwin
v. Covode, 24 Pa. 162.

²⁸ Cases cited above; and see
Wentz's App., 106 Pa. 301; McClinton
v. Dana, Id. 386.

²⁹ Williard v. Williard, 56 Pa. 119.

³⁰ Bainbridge v. Mines, 53.

In *Neel v. Neel*, *supra*, it is said: "As to all tenants for life, the rule has always been that the working of open mines of all sorts is not waste. The tenant for life has the usufruct of the whole land, and takes the whole profit that can be derived from it in following out the use made of it by the donor. * * * And the tenant for life is not at all limited by the extent of the use made of the property by the author of the gift. It is sufficient that he opened them (the pits) and derived any profit from them, even if it were only fire bote. The fact of his opening the pits made the coal a part of the profits of the land, and the right to them will pass as such by a devise of a life estate. If he meant otherwise, he should have said so, not having said so, this is the legal inference of his intention. * * * And the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes."

In *Irwin v. Covode*, *supra*, the court says: "As yet the Legislature have prescribed no limitation to the use which a tenant for life may make of open mines. In virtue of their common law powers, the court might doubtless restrain unskillful mining and wanton injury to the inheritance, but not such proper mining as is subject to no other objection than its liability to exhaust the mine. The profits of coal mines depend much on expensive preparations for working them, and in order to compensate this necessary investment, as well as to compete successfully with rival operations, a large amount of coal must be mined and sold. To deny a tenant for life to mine largely, would be to deny him the right to mine profitably — to shut him up to mining for his own fuel merely. * * * Nor are such improvements necessarily injurious to the remainder-man, for the estate is liable to fall in at any moment, and when it comes to him he takes it with all that has been added to develop and improve it." Should the tenant for life exhaust lands so held, and leave them ruined on the hands of those in succession, "it would be no more than occurs in every life estate in chattels which perish with the using. So long as the estate is used according to its nature — *in formam doni* — it is no valid ob-

jection that the use is consumption of it; and it is no fault of the tenant that it is not more durable."

If a life estate be devised to one with remainder to his children, if there be a child in being at the death of the testator, the whole remainder in fee simple vests in such child liable to be partially divested by the coming *in esse* of other children.³¹

In such a case the child in being or coming into being and taking a vested remainder in fee subject to open and let in the after born children might be regarded in some sense as holding the legal estate of after born children.³² That there is no rule of law which converts a life estate expressly created into a fee absolute or qualified, or into any other form of estate greater than a life estate, by reason of there being coupled with it a power of sale, has been repeatedly declared.³³ And no rule of law prohibits a life tenant from either assigning or subletting a part or the whole of his interest unless precluded from so doing by the express terms of his grant. He cannot, however, make a conveyance of his estate except by deed.³⁴ In the matter of repairing dilapidated buildings it may be said that if they were in a state of decay and ruin at the commencement of the life tenant's term, he cannot be called upon to make any extended repairs.³⁵ And loss or damage by fire, if the result of unavoidable accident, will in no way compromise the life tenant.³⁶

§ 67. Life estates with power of disposition. Where a will gives an absolute ownership of property, with full power of

³¹ Baker v. Lorillard, 4 N. Y. 266; Hayes, 29; see also Hannan v. Osborn, 4 Paige, 336, 3 L. Ed. 460.

³² Moore v. Littel, 41 N. Y. 66; Jenkins v. Fahey, 73 N. Y. 355; Dodge v. Stevens, 105 N. Y. 585; see also Livingston v. Greene, 52 N. Y. 118; Smith v. Scholtz, 68 N. Y. 42; Sheridan v. House, 4 Abb. App. Dec. 218; Brevort v. Brevoort, 70 N. Y. 140.

³³ Glover v. Stillson, 56 Conn. 316; Peckham v. Lego, 57 Id. 553; 7 L. R. A. 419; Hull v. Holloway,

58 Conn. 210; see also Stuart v. Walker, 72 Me. 145, 39 Am. Rep. 311; Welsh v. Woodbury, 144 Mass. 542.

³⁴ Jackson v. Van Hosen, 4 Cow. 325; Stewart v. Clark, 13 Met. 79.

³⁵ Wilson v. Edmonds, 24 N. H. 517; Clemence v. Steere, 1 R. I. 272.

³⁶ Barnard v. Poor, 38 Mass. 378; Spaulding v. Chicago & C. R. R. Co., 30 Wis. 110; Maull v. Wilson, 2 Har. 443; Althorf v. Wolfe, 22 N. Y. 366.

disposition, a limitation over is void because it is inconsistent with the absolute title given to the first devisee." On the other hand, in Massachusetts, and generally elsewhere, the principle will not apply where the will purports to give only a life estate to the first taker, with merely the power of disposition of the remainder as a separate interest. In such a case the property passes under the original will through the execution of the power to the person designated, and if it is not executed it remains to be affected by the other provisions of the will, or to pass, an undivided estate of the testator.³⁷

§ 68. The doctrine of waste as applied to life tenancies. The doctrine of waste is of wide application. In the case of a fee simple, as we have previously noted, it is entirely destitute of force. The owner of such an estate is at liberty to create all the devastation about the premises he sees fit. His caprice is practically without limit in this respect. But in all instances of inferior tenancies the doctrine of waste applies, and it is because of its diversified application, that any extended treatment of the topic is omitted. It is my purpose to devote a subsequent chapter to the consideration of this subject, and to accord it such extended treatment as will suffice for all the purposes of this present undertaking. By this method tedious duplications of topics can be easily avoided without disturbing the symmetrical development of the general scheme. In this immediate connection it will suffice to say that the courts are very indulgent to the demands of the reversioner, and will grant injunctive relief in all cases where it appears that the life tenant is injuring or even threatens to injure the inheritance. This attitude of the court is fully sanctioned by the following authorities."

³⁷ Ramsdell v. Ramsdell, 21 Me. 288; Jackson v. Bull, 10 Johns. 19; Kelley v. Meins, 135 Mass. 235; Van Horne v. Campbell, 100 N. Y. 287.

³⁸ Welsh v. Woodbury, 144 Mass. 542; Collins v. Wickwire, 162 Mass. 143; Burleigh v. Clough, 52 N. H. 567.

³⁹ Duvall v. Waters, 1 Bland Ch. 569; Kane v. Vandenburg, 1 Johns. Ch. 11; Hughlett v. Harris, 1 Del. Ch. 348; Ehrardt v. Boaro, 113 U. S. 539; Whitney v. Morrell, 34 Wis. 644; Smith v. Sharpe, 1 Busbee, 91; Drown v. Smith, 55 Me. 143; Clemence v. Steere, 1 R. I. 272; Miles v. Miles, 32 N. H. 147;

§ 69. "Praying in aid." In the interests of full discussion, it may be considered necessary to refer to a once honored method of common law procedure, by which the holder of an estate for life might summon to his assistance the remainderman on the theory that the latter held the muniments of title, and hence was in a position, in the event of suit being brought against the tenant for life, to successfully defend the same by the production of title deeds and other necessary documents. This right, as we have said, was an incident of common law procedure, but is of little or no consequence on this side of the Atlantic, as with the general abolition of what were distinctively known as real actions under the common law system, the importance of the subject has all but disappeared. Those anxious for information upon subjects of no practical concern will find this topic treated in Spence Eq. Jur. and in Mr. Preston's well known Treatise on Estates.

§ 70. Rule as to taxes, incumbrances, etc. Primarily it is the duty of the reversioner to pay all incumbrances upon the estate. But it is entirely competent for the grantor to place this duty upon the life tenant. In the absence of any recital to that effect, the rule holds true that the reversioner is the proper party to make such payment. Instances, however, frequently arise where, on the maturity of a mortgage debt, the life tenant in order to prevent an involuntary alienation of his holding is obliged to discharge the incumbrance. In such a case the courts resort to the principles of equitable apportionment. The tenant being charged with a certain amount of interest—which it is his duty to pay, together with the taxes, repairs, etc. And the reversioner becomes chargeable with the difference between the entire sum paid and the amount of this interest which is ascertainable by the aid of life insurance mortuary tables. The costs of suit should also be assessed against him, as it is presumptively his neglect of duty that necessitated the payment.⁴⁰ In the case first cited the rule was enforced in an action for dower, and the decision turned upon the wording of a Massachusetts

and see the opinion of Chief Justice
Follett in *Hamilton v. Austin*, 36
Hun, 143.

⁴⁰ *Newton v. Cook*, 4 Gray, 46;
Bell v. Mayor of New York, 10
Paige Ch. 71.

statute which is merely declaratory of a well recognized rule. The phraseology of the law in question is as follows: "If the husband shall be seized of land, subject to any mortgage which is valid and effectual as against his wife, she shall, nevertheless, be entitled to dower in the mortgaged premises, as against every person except the mortgagee and those claiming under him; provided, that if the heir, or other person, claiming under the husband, shall redeem the mortgage, the widow shall either repay such part of the money paid by him as shall be equal to the proportion which her interest in the mortgaged premises bears to the whole value thereof, or she shall, at her election, be entitled to dower only according to the value of the estate, after deducting the money so paid for the redemption thereof."⁴¹

Life tenant cannot charge the remainder-man with the value of improvements on the property.⁴² Taxes are always charged to the former; but assessments for permanent improvements are apportionable, in equity, according to the circumstances of the case, and their respective interest in the property. Obviously, where the life tenant is an octogenarian, in feeble health, and the remainder-man just approaching his majority, to charge the former with the entire cost of permanent improvements, such as flagging, curbing, paving, and the like, would hardly accord with any refined sense of justice.⁴³

Where there is an estate for life, and a remainder over in fee, the obligation is imposed upon the life tenant to pay all taxes, interest on any mortgaged indebtedness, and the expenses incident to insurance and repair; but this general rule is liable to be changed by the party creating the estate.⁴⁴

§ 71. Adverse possession as between life tenant and reversioner. The doctrine of adverse possession, which may be invoked in so many cases, has no application to the relation existing between the life tenant and his reversioner. No act of the tenant can possibly be construed as working a dis-

⁴¹ Rev. Stats. chap. 60, secs. 1 2. 359; Schier v. Eldridge, 103 Mass.

⁴² Thomas v. Evans, 105 N. Y. 601. 343.

⁴³ Peck v. Sherwood, 56 N. Y. 434. ⁴⁴ Matter of Albertson, 113 N. Y. 615; Stillwell v. Doughty, 3 Brad. 434.

seizin of the latter, but the life tenant himself may be dis-seized through the machinations of a stranger to the title, and twenty years adverse possession of the estate, would create an extinguishment of the tenant's interest. Such adverse possession, however, can in no way affect the rights of the reversioner. He is not chargeable with knowledge of the nature of the occupancy, and his rights cannot be subverted by the acts of others over whom he has no control.⁴⁵

§ 72. Possession of the muniments of title. This subdivision need not detain us long. In the colonial days and in the mother country at the present time possession of the title deeds is a matter of considerable consequence. In this country, however, the all but universal system of recording any document effecting the tenure of real property has largely superseded the necessity of holding title deeds. If there is any rule affecting the subject, it should be one in favor of allowing the owner of an estate for life to retain the possession. This would harmonize with the English rule affecting the subject, and perhaps give some additional security to the life tenant.⁴⁶ This case was decided in 1821 — before the revision of 1830 — and can no longer be regarded as establishing a rule of any particular importance. Sententiously, we may say, registration accomplishes all that was originally claimed as an advantage in possessing the actual deeds by which the property was conveyed. Under the Torrens system, which now bids fair to become domesticated in the United States, there is even less call than ever for the presence of title deeds⁴⁷.

§ 73. Termination of life estates. In this country an estate for life terminates only with the natural death of the life tenant. This is the only method, unless it be that the action of the State in its exercise of the right of eminent domain, can be said to work a termination. Even where the entire property is taken through condemnation proceedings full com-

⁴⁵ Whitney v. Salter, 36 Minn. 103; Kauffman v. Pres. Cong., 6 Binn. 59. and the Massachusetts case of Scanlan v. Wright, 13 Pick, 523.

⁴⁷ 1 Sugden, Vendors, 468; Ward

⁴⁶ See Williams, Real Prop. 375, v. Fuller, 32 Mass. 15.

pensation must be made, and the rights of the life tenant to interest on the sum so obtained, would remain inviolate and enforceable in equity. So that, in reality, the original postulate holds true—the estate is only determined by the natural death of the life tenant. The organic law of this country, expressly provides that bills of attainder shall not be passed, and that no crime, however heinous, shall work forfeitures of estate, or corruption of blood. So, too, the old rule of common law extraction, which declared a forfeiture of the estate, whenever the life tenant attempted to grant a greater estate than the one he was possessed of, has no recognition in this country. Generally, it may be said, that all forms of forfeiture are abhorrent in our laws, and the courts are inexorably hostile to any attempts in that direction.

§ 74. **Rule as to surrenders.** A surrender is defined by Lord Coke, and by other authorities, to be a yielding up of an estate for life or years to him that has an immediate estate in reversion or remainder, or the resignation of a particular estate for life or for years to him in the immediate reversion or remainder; and it can only be to the person who has the reversion or remainder.⁴⁸ It is a conveyance, the converse of a release. The release operates by the greater estate descending upon the less; the surrender is the falling of the less estate into the greater.⁴⁹

The surrender may be express or implied. The latter is where an estate, incompatible with the existing estate, is accepted by the tenant for life; as if the lessee take a new lease of the same land.⁵⁰ But in order that the second lease may operate as a surrender of the first, it is essential that the lease be a valid one; although it is not necessary that the second lease should be to the first lessee. If given to a third person by the consent of the first lessee, it operates as a surrender.⁵¹

⁴⁸ Co. Litt. 338, a; Springstein v. Schermerhorn, 12 Johns. R. 357; Comyn's Digest, tit. Surrender, a.

⁴⁹ Willard on Real Prop. 437; Touchstone, 300, 301.

⁵⁰ 2 Bouv. Inst. 263.

⁵¹ Bedford v. Terhune, 30 N. Y. R. 453.

§ 75. Value of life estate, how computed. In *Garland v. Crow*, 2 Bailey, 24, the court say: "In contemplation of law, an estate for life is equal to seven years' purchase of the fee. To estimate the present value of an estate for life, interest must be computed on the value of the whole property for seven years; and perhaps interest on the several sums of annual interest from the present time to the period at which they respectively fall due, ought to be abated." The American mortuary tables are frequently resorted to as furnishing valuable and reliable data for estimating the probabilities of one's life expectancy.

§ 76. The doctrine of merger examined. The doctrine of merger in its entire scope is one of overshadowing importance, but as applied to estates for life it has little significance. The only functions that merger can perform in so far as this particular estate is concerned, is to declare the lesser estate as absorbed in the greater estate, whenever there is a union of the two in one and the same person.⁵² But this union must comprise both the legal and the equitable estate.⁵³ And here we encounter a familiar principle of the equity jurisdiction, which will refuse to allow the least scope to the doctrine of merger where it will work an obvious injustice or contravenes the declared or presumed intent of the parties.⁵⁴ In fact, merger has never been a special pet of the equity jurisprudence.⁵⁵ And it is swift to condemn any transaction that presents special features of hardship or of gross inequality.

⁵² *James v. Morey*, 2 Cow. 246; 1 Greenl. Cruise, 104; *Moore v. Luce*, 29 Pa. St. 260.

⁵³ *Jordan v. Cheney*, 74 Me. 362; *Pratt v. Bank of Bennington*, 10 Vt. 293; *Allen v. Anderson*, 44 Ind. 395.

⁵⁴ *Winona, etc., R. Co. v. County*, 3 Dak. 21; *Dougherty v. Jack*, 5 Watts, 456; *Purdy v. Huntington*, 42 N. Y. 334.

⁵⁵ *Bispham's Principles of Eq.*, sec. 160.

CHAPTER VI.

DOWER.

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92. The incident of quarantine.
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§ 77. **Preliminary.** Dower, like most of the incidents of the common law that were brought by the colonists to this country has undergone many serious statutory modifications. In some of the States it has been utterly abolished, and in others never existed. Wherever it is still recognized, like the cognate estate of curtesy, it passes through three distinct gradations before reaching its consummation. It is an estate highly favored in law, although its origin is lost in the mists of pre-historic tradition. As a provision for a dependent widow, and as an effective devise for the protection of a maturing family, it has many attributes that commend it to

the favorable consideration of the law, and the courts are zealous in preserving its incidents, and protecting its beneficiaries.¹ In treating of the subject, however, it must be borne in mind that the variant character of the legislation in the different States will prevent the co-ordination of the topic into any set series of rules, and it is perhaps inexpedient in a general treatise to attempt any classification or grouping of the different States having analogous provisions on the subject.

§ 78. Definition and nature. Our statutes respecting "dower" define it as the use for life of one third of all the lands of which the husband was seized during the marriage relation. "Dower" is defined by the English authorities as the provision which the law makes for a widow out of the lands or tenements of her husband for her support and the nurture of her children.² The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a country like ours, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the State founded in policy and the provision of the widow is a part of the law of distribution and the aim of the statute is not subsistence alone, but provision commensurate with the estate.

Dower is founded on the wisdom of ages; so ancient that neither Coke nor Blackstone can trace it to its origin; widespread as the Christian religion; and entering into the contract of marriage of all Christians; the husband on the most solemn occasion of his life contracting that of all his worldly goods he endows his wife.³

The power to take private property for public uses is termed the right of eminent domain. In every political sovereign community there inheres, necessarily, the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community

¹ *Munger v. Perkins*, 62 Wis. 499.

² *Combs v. Young's Widow*, 4

³ *Co. Litt.* 30a; 2 *Bl. Com.* 130.

Yerg. (Tenn.), 218.

at large. This power, denominated the "eminent domain" of the State, is as its name imports, paramount to all private rights vested under the government and these last are by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The whole policy of the country relative to roads, mills, bridges and canals, rests upon this single power, under which lands have always been condemned; without the exertion of the power no one of these improvements could be constructed. The exercise of a franchise is subject to the power.⁴ With us dower is of purely statutory origin and is determined by the law of the State where the property is situated. During the life of the husband the right is a mere expectancy or possibility, not being a natural right but rather the creature of statute. The power that gives may increase, diminish or wholly annul the right. Upon the death of the husband the right of the widow becomes vested, prior to that event it is inchoate.⁵ Usually it attaches to wild or unproductive lands — to an equity of redemption and to all real estate of which the husband died seized. It does not affect a pre-emption claim nor estates held by virtue of a trust express or implied, nor in partnership lands until after the payment of the debts and all outstanding obligations of the partnership nor in land contracts that are void for some illegality.

Dower is an estate for life which the law gives the widow in the third part of the lands and tenements, or hereditaments of which the husband was solely seized, at any time during the coverture, of an estate in fee or in tail in possession, and to which estate in the lands and tenements the issue, if any, of such widow, might, by possibility, have inherited. In Pennsylvania the sole seizin of the husband is not necessary.⁶ To create a title to dower, three things are indispensable: 1. Marriage.⁷ This must be a marriage not

⁴ West River Bridge Co. v. Dix, 6 How. 531. (Per Daniels, J.)

⁵ Randal v. Kreiger, 23 Wall, 147.

⁶ Watk. Prin. Con. 38.

⁷ Judge Cooley says in Hutchins v. Kimmell, 31 Mich. 126; s. c. 18 Am. Rep. 164, 166, that "whatever

the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time live together professedly in that relation, proof of these facts would be suffi-

absolutely void, and existing at the death of the husband; a wife *de facto*, whose marriage is voidable by decree, as well as a wife *de jure*, is entitled to it; and the wife shall be endowed, though the marriage be within the age of consent, and the husband dies within that age.⁸

2. Seizin. The husband must have been seized some time during the coverture of the estate of which the wife is dowerable.⁹ An actual seizin is not indispensable, a seizin in law is sufficient.¹⁰

3. Death of the husband. This must be a natural death; though there are authorities which declare that a civil death shall have the same effect.¹¹

§ 79. **Requisites at common law.** The three requisites of dower at common law are marriage, seizin of the husband at some time during coverture; and death of the husband.¹² The seizin referred to must be a valid seizin in law.¹³ And it has been further held that he must have been seized of a present freehold interest in the land.¹⁴

Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither canceled nor altered at the will of the parties

cient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated it."

⁸ Co. Litt. 33, a; 7 Co. 42; Doct. & Stud. 22; Cruise Dig. t. 6, c. 2, s. 2, et seq.

⁹ Co. Litt. 31, a.

¹⁰ Co. Litt. 31, a.

¹¹ 1 Bouvier Law Dict. tit. Dower.

¹² 1 Greenl. Cruise, 154; Stevens v. Smith, 4 J. J. Marsh, 64; Denton v. Nanny, 8 Barb. 618.

¹³ Durando v. Durando, 23 N. Y. 330; Butler v. Cheatham, 8 Bush. 594; Atwood v. Atwood, 22 Pick. 283; Galbraith v. Green, 13 Serg. & R 85.

¹⁴ Weir v. Tate, 4 Ired. Eq. 264; Torrence v. Carbry, 27 Miss. 697; Mann v. Edson, 39 Me. 25; Welch v. Buckins, 9 Ohio St. 331; Pritts v. Ritchey, 29 Pa. 71; Stevens v. Smith, supra.

upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term that exists is, that the contract of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society.¹⁵

§ 80. Doctrine of seizin examined. The rule of excluding dower, where the seizin of the husband was only momentary,¹⁶ is not confined to cases where the grantor acts in carrying out a naked trust. When a mortgage is given by grantee, at the same time that a conveyance of the land is executed to him, no right of dower attaches, especially where the incumbrance exceeds the value of the estate.¹⁷

Transitory or instantaneous seizin. Dower never can attach to the real property of the husband when the seizin of the husband is merely instantaneous, as where he is the intermediary, through whom a conveyance is made, or where for purposes of raising the money to pay upon the purchase price he is temporarily invested with the title (as for few moments only), and gives a mortgage to secure the purchase price as part of the same transaction.¹⁸

The law does not require a release of dower where the husband's seizin was only instantaneous, nor is any release of homestead required in a like case. The intermediary, in whom the fee reposes for an instant, cannot equitably claim to be the owner — he instantly deeds to another person — no consideration passes, to or from him, and the law treats his

¹⁵ Story, Confl. L. sec. 109.

¹⁶ 4 Kent Com. 38; 1 Co. Litt. ch. 5, sec. 36; 4 Mast. 566; 14 Id. 352; 15 Johns. 485; 2 Gill. & J. 324.

¹⁷ *Ib.*

¹⁸ Dusenbury v. Hulbert, 59 N.

Y. 541; Bradley v. Bryan, 43 N. J. Eq. 400; Brown v. Phillips, 40 Mich. 270; Perkins v. Davis, 120 Mass. 408; Hautt v. Duncan, 40 Ia, 254.

relation with the property as part of a general transaction in which he has no personal concern.¹⁹

The doctrine of instantaneous or temporary seizin which excludes dower, whenever such cases occur, is grounded upon the most obvious principles of equity.²⁰

When a person to whom land is conveyed by deed immediately conveys to a third party so that in effect both deeds are a part of the same transaction and in furtherance of the same design, the seizin of the grantee is only instantaneous and for a specific purpose and hence the dower interest of the wife does not attach. The fact that the deeds were executed on the same day is not conclusive evidence that the seizin was instantaneous, indeed, this would seem to be a question for the jury to decide in the light of surrounding facts and circumstances.²¹

Such a regulation must be regarded as one of doubtful propriety, conditions may not only be conceived but actualized, by which fraudulent transactions can be successfully supported as by the simple devise of withholding the second deed from record and then treating the seizin as perfected, thus investing the wife with all the attributes of the inchoate dower estate, upon which, with favoring co-incidents, vast schemes of fraudulent manipulations may be based. The mere fact that a question is always presented, as to the instantaneousness of the seizin, which question must be submitted to the interpretation of such juries as by curtesy, we must, editorially, designate as "intelligent," and then apologize abjectly for the perverted use of the term — is all sufficient in itself to condemn the rule as an unfit one to foist upon the law of real property — to add one more *uncertainty* to the devolution of estates is senseless, and when that element of uncertainty is one that requires a jury trial to determine, the expense, vexation and delay make the objection all the more italicized.

¹⁹ Borden v. Sacket, 113 Mass. 214; Woodward v. Sartwell, 129 Mass. 210.

²⁰ Elliott v. Plattor, 43 Ohio St. 198; Pouder v. Ritzinger, 102 Ind. 571.

²¹ Chickering v. Lovejoy, 13 Mass. 51; Clarke v. Monroe, 14 Mass. 351; Borden v. Sackett, 113, 214; Hazelton v. Lesure, 9 Allen, 24.

§ 81. Who may be endowed. This question is very easy. The Ohio statute has answered it for us—"the widow of any person dying." At the time of the husband's death she must occupy the legal status of wifehood. It matters not whether the community so regarded her, if, as matter of law, she would be recognized as occupying that relation, her right is inviolable. Even an adulterous intrigue will not affect it, where there has been a condonation of the offense, and while adultery may furnish a valid ground for divorce until the decree is rendered the marital relation exists. Death, of course, severs this relation, and there can be no annulment of the marriage after the death of either party to it. Such a proceeding, if attempted, would outrage our sense of decency as well as our sense of justice, as death has prevented one party from having his or her day in court, and whatever advantages or disadvantages may have accompanied the marriage relation are over and gone. Instances are said to have arisen, in the English practice, where the attempt has been made to avoid a marriage after the death of one of the parties to it, in order to bring the survivor within the provisions of a devise, and thus give to him or her certain benefits, but I have been quite unable to discover any such case and none have ever appeared under the American practice.

§ 82. What property is subject to the dower. Generally it may be assumed that dower will attach to all of the lands and tenements of which the husband was seized as an estate of inheritance at any time during the existence of the coverture, and also to all lands and tenements of which he held the fee simple in remainder or reversion at the time of his death. This, it will be observed, extends the right of dower to all equitable estates in fee. But it is of the utmost importance to note a certain subtlety that lurks even in words of direct import as are here employed. Dower will attach to all legal estates held at any time during the coverture. But it only attaches to such equitable estates as were owned at the time of the husband's death.

A widow is entitled to dower in all estates of inheritance of which her husband had at any time during coverture been

seized, and in all corporeal hereditaments and incorporeal hereditaments savoring of realty."²²

After considerable controversy, in the early stages of our jurisprudence the old common law theory that dower did not attach to the equity of redemption (*Mayburry v. O'Brien*, 40 U. S. 21; *McIver v. Cherry*, 8 Humph. Tenn. 713), has been overthrown, and a more liberal policy has been inaugurated. Dower now extends to the equity of redemption, and the courts are swift to protect the widow's rights in such cases."²³

The right of dower extends to a share of the proceeds of mines although not opened until after the husband's death, where they are opened on lands held only for mining purposes and available only for the minerals and the statutes gave to the widow the "use during her natural life of one-third of all the lands whereof her husband was seized" during marriage.

The cases are all agreed that a right to dower exists in mines opened during the husband's lifetime."²⁴

The doctrine that a widow is not dowable of mining lands, unless at the time of the death of her husband mines had been opened, is traceable to *Stoughton v. Leigh*, 1 Taunt. 402. There the decedent left a large estate, upon which there was a lead and a coal mine, neither of which had been opened; two other lead and coal mines, which he had leased to tenants, reserving certain rents which were to be paid whether the tenant did or did not open the mines. One of each class of mines had been opened at the time of his death — a lead and a coal mine — which he had leased reserving royalties payable in ore and coal. The coal mines had been opened at the time of his death, but the lead mine had not. Two other lead mines and two other coal mines had been opened.

²² 1 Bishop, Married Women, sec. 256.

²³ *Daniel v. Leitch*, 13 Grat. 195; *Harrow v. Johnson*, 13 Met. 578; *Snyder v. Snyder*, 6 Mich. 470; *Fish v. Fish*, 1 Conn. 539; *Bell v. New York*, 10 Paige Ch. 49; *Hennagan v. Harlee*, 10 Rich. Eq. 285; *Barbour v. Barbour*, 46 Me. 9.

²⁴ *Moore v. Rollins*, 45 Me. 495; *Hendrix v. McBeth*, 61 Ind. 473; 28 Am. Rep. 680; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Coates v. Cheever*, 1 Cow. 460; *Stoughton v. Leigh*, 1 Taunt. 402; *Crouch v. Puryear*, 1 Rand. (Va.), 258; *Billings v. Taylor*, 10 Pick. 460; 20 Am. Dec. 533.

Deceased was also entitled to minerals lying under lands not his own, and had operated certain mines thereon, and others were unopened. The court held that the wife was dowable of all the open mines but was not dowable of the mines or strata which had not been opened, whether owned by lease or not. The decision may not be without reason, but certainly no reasons are given in the opinion. Clearly as to those lands which had been leased, they had been by the deceased devoted to mining purposes, and the mode of enjoyment and source of profit, under all the authorities, had been fixed and determined by the decedent; and as to the rents which were to be paid whether the mines were opened or not, under all the authorities on the subject of dower, the widow was entitled to participate in them.

In *Malloney v. Horan*, 49 N. Y. 111; s. c. 10 Am. Rep. 335 the decisions are examined by Judge Folger, and the conclusion is reached that the wife is entitled to dower when the conveyance of the husband in which she joined is set aside as fraudulent as to creditors. The decision seems to settle the law in New York in conformity to the weight of authority elsewhere. As to the effect and operation of a release by a wife of her inchoate right of dower, Judge Folger observes that the wife cannot, neither can a widow, until admeasurement, convey or assign her dower. The joining with the husband in his conveyance is but a release by the wife of a contingent future right, and operates against her by way of estoppel. And inasmuch as the release of dower, to be operative, must be in conjunction with the conveyance or other instrument which transfers title to real estate, it follows that if the conveyance or instrument is void, or ceases for any reason to operate, and no title has passed, or none remained, the release of dower does not after that operate against the wife, and she is again clothed with the right she had released. Essentially to the same effect are decisions in *Stinson v. Sumner*, 9 Mass. 143; *Robinson v. Pates*, 44 Mass. (3 Met.), 40; *Woodworth v. Paige*, 5 Ohio St. 70; *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; *Morton v. Noble*, 57 Ill. 176; *Porter v. Lazear*, 109 U. S. 84; bk. 27 L. ed. 865; 3 Sup. Ct. Rep. 58. These cases and others which support the claim of dower where the wife joined the husband in a

fraudulent conveyance which creditors avoided, we have examined, also all the authorities cited upon the other side of the question, but shall not comment on them. It is a familiar remark that dower is a highly favored right in the law; certainly the right ought to be upheld where it can be without a violation of the legal principles.²⁵ As the prevailing current of authority supports the right in most cases, we are disposed to yield to that authority. We think it plain that an inchoate right of dower is not a future estate. The wife's interest is contingent; does not become vested until the death of her husband, and cannot be conveyed or relinquished except in the manner pointed out by the statute.²⁶ The wife cannot, during coverture, convey or release her right of dower to one having no interest in the land, except that which he derived from her release, or to a stranger to the title."

Dower right. As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee; and such taking and payment will confer as absolute title, divested of any inchoate right of dower.²⁷ This case is commented upon and limited in *Simar v. Canaday*, 53 N. Y. 298 (1873); Post, sec. 635; Lewis, Em. Dom. sec. 323, and cases; *Wheeler v. Kirtland*, 27 N. J. Eq. 534. Nor is a widow dowable in lands dedicated by her husband in his lifetime to the public, where the dedication is complete, or has been accepted or acted upon by the municipal authorities.²⁸ But where land, charged with a dower interest, was taken for a street without notice to the widow, it was held that the municipal corporation was liable for the income therefrom, to be recovered in an action of debt.²⁹

§ 83. **Legal incidents of dower.** No estate actually vests in the wife until the death of the husband, and the assignment

²⁵ 1 Scrib. Dow., 2d. ed., ch. 30.

²⁶ *Wilber v. Wilber*, 52 Wis. 298.

²⁷ *Moore v. New York*, 8 N. Y. 110 (1853).

²⁸ *Gwynne v. Cincinnati*, 3 Ohio,

25 (1827); *Duncan v. Terre Haute*, 85 Ind. 104.

²⁹ *York Borough v. Welsh*, 117 Pa. St. 174; see *Mills Em. Dom.* sec. 7; 2 *Dillon on Mun. Corp.* 695.

of the dower interest.³⁰ These events terminate the uncertainty that has heretofore characterized the estate, and it is at once divested of its contingent character and becomes a fixed and positive interest in real property legally designated as an estate for life created by law.³¹ A Vermont case holds that the right vests absolutely on the husband's natural death.³² But her possession is regarded, in law, as a mere elongation of the husband's seizin.³³ Right here it is well to observe a close distinction. While it is true that the husband's death is an absolute prerequisite to the vesting of the estate, still that occurrence gives her merely a chose in action, and until the actual assignment of the dower interest the estate is in a nebulous condition which equity will protect from infringement.³⁴

The right of dower is a vested interest.³⁵ The courts universally protect it, and regard it as a humane and politic provision conducive to the stability of family ties, and the nurture of the children of the marriage. They will not allow the husband to defraud the wife of this expectant right by making a secret conveyance of his property on the eve of marriage, and where the facts were known to the grantee, such conveyances will be promptly set aside as fraudulent, or the incident of dower will be fastened upon the property so conveyed.³⁶ But the contra view seems to have been adopted in *Jenny v. Jenny*, 24 Vt. 324.

It is a general rule that provisions in a will intended for the support of the wife will receive the most favorable construction to accomplish the purpose intended. Upon a critical examination of the cases I find none which embarrass or conflict with this proposition; indeed, it may be said that the

³⁰ *Hildreth v. Thompson*, 16 Mass. 191; *Smith v. Shaw*, 150 Mass. 297.

³¹ *Hoots v. Graham*, 23 Ill. 81; *Lawrence v. Miller*, 1 Sandf. 516.

³² *Johnson v. Johnson*, 41 Vt.

³³ *Windham v. Portland*, 4 Mass. 384.

³⁴ *Andrews v. Andrews*, 14 N. J. L. 141.

³⁵ *Tameling v. U. S. F. & D. Co.*,

93 U. S. 663; *Betts v. Wise*, 11 Ohio, 219; *O'Ferrall v. Simplot*, 4 Iowa, 381; *May v. Rumney*, 1 Mich. 4.

³⁶ *Cranson v. Cranson*, 4 Mich. 230; *Brewer v. Connell*, 11 Humph. 500; *Petty v. Petty*, 4 B. Mon. 215; *Youngs v. Carter*, 10 Hun, 194; *Killinger v. Reidenhauer*, 6 Serg. & R. 531.

principle of interpretation derives its strength not so much from authority as from its own inherent force.

The law regards with favor the marital relation, and frowns upon the attempts of individuals to sever or interrupt it. In *Tenant v. Braies*, Tothill, 78, there was a bequest made to the daughter of the testator of a sum of money "if she will be divorced from her husband." The gift was held good, but the condition void. In *Brown v. Peck*, 1 Eden's Ch. 140, a testator directed his executors to pay to his niece, Rebecca, "if she lived with her husband, £2 per month and no more; but if she lived from him and with her mother, to allow her £5 per month." The condition was held to be *contra bonos mores*, and the legacy of £5 per month simple and pure. In *Conrad v. Long*, 33 Mich. 78, one-half of the testator's real estate was devised to his sister, Elizabeth, "if at any subsequent time she should conclude not to live with her present husband, Henry Long, as his wife. But if she did continue to live with him, then to the testator's brother." It was held that she took the estate clear of conditions."

The rule of the common law as to the effect of a husband's acts during the coverture, on the dower interest of his wife in his real estate, is thus stated by Scribner on Dower, vol. I, p. 603, sec. 1: "After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right attaching in law, which, although it may never become absolute — as if the wife died in the lifetime of the husband — yet, from the moment that the facts of marriage and seizin concur, it is so fixed on the land as to become a title paramount to that of any person claiming under the husband by subsequent act. The alienation of the husband, therefore, whether voluntary, as by deed or will, or involuntary, as by bankruptcy or otherwise, will confer no title on the alienee as against the wife in respect of her dower, but she will be entitled to recover against such alienee in the same manner as she would have recovered against the heir of the husband had the latter died seized."

²⁷ See, also, *Cooper v. Remsen*, 5 Johns. Ch. 459; *Rice's Probate Law*, 151.

In *Pifer v. Ward*, 8 Blackf. 252, it was held that "if a mechanics' lien accrue after the employer's marriage, and the employer die after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien." And in *Bishop v. Boyle*, 9 Ind. 169; 68 Am. Dec. 615, it was held that "the widow's right of dower extends to and includes a house erected on land of her husband, and her claim is superior to a mechanics' lien for which the property was sold under a decree against the husband to enforce the lien." The court said: "The wife's dower is a favorite of the law, not resting in contract or resulting from the marriage relation. Hers is the elder lien. The mechanic bestows his labor with a knowledge of her prior right to the real estate, and he knows that the house he is building, as brick is added to brick and nail after nail is driven, becomes real estate. He may protect himself by security, or not venture. She is passive, and can do nothing. It is for this reason that she is declared to be a favorite of the law."³⁸ In *Shaeffer v. Weed*, 8 U. S. 511, it was held that "a widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics," etc., "but she is entitled to dower of all the real estate of which her husband was seized during coverture, unless she had released it in the form prescribed by law." In *Gove v. Cather*, 23 Ill. 634; 76 Am. Dec. 711, it was held: "The enforcement of a mechanic's lien for improvements made by the husband in his lifetime will not cut off his wife's right of dower, even to the extent of the value of such improvements."³⁹

a. *Subordinate to vendor's lien.* A simple rule may be said to govern this and cognate subjects. All species of liens for the purchase price of the land are accorded superior equities, and in no case are such liens made subordinate to the right of dower. The authorities are not only decisive but unanimous on this subject, and in cases where the lien assumes the form of a mortgage given to the vendor to secure the payment of the purchase price, the right of dower is subordinated to the lien, even where the wife neglects or refuses to

³⁸ See, also, *Mark v. Murphy*, 76 Ind. 534.

³⁹ See, also, *Dingman v. Dingman*, 39 Ohio St. 172.

sign the mortgage.⁴⁰ And a third party advancing the funds for the first payment on the purchase price, securing himself by a purchase-money mortgage, will acquire superior rights to those of dower.⁴¹

As a general rule every kind of lien for the purchase money is superior to the right of dower.⁴² In *Hugunin v. Cochrane*, 51 Ill. 302, the court said: "There is no doubt that the husband of the plaintiff became invested with a dry naked fee, in law; but there is as little doubt that Hugunin held a lien as vendor of the premises. That lien was superior to her claim of dower both in law and justice." The wife must take her dower as she takes her husband, *cum onere*. She may come in and redeem the property, and then and not until then is she entitled to her dower.⁴³ So a purchase-money mortgage is good and effectual against the wife of the mortgagor, without her joining in the execution of it. The seizin of the husband is instantaneous only, and it is a well settled rule that in such a case no estate nor interest can intervene.⁴⁴ By parity of reasoning if a man purchases land and as a part of the same transaction gives back a mortgage for the purchase price, the widow of the purchaser will be denied a dower interest in the land so purchased, until the property is cleared of the incumbrance.⁴⁵

§ 84. While inchoate it is regarded as a vested right. While the inchoate right of dower must be regarded as a vested right of value, dependent upon the contingency of survivorship for its complete enjoyment, it is not that separate property that passes by a conveyance, but a right, that under appropriate circumstances, the beneficiary may release. It is of a peculiar character and before assignment, under the decree of some court of competent jurisdiction, the wife has no seizin. Dower rights are among the most salutary provisions of the common law. They were originally created

⁴⁰ *Wheatley v. Calhoun*, 12 Leigh (Va.), 264; *Eslava v. Lepretre*, 21 Ala. 504; *Stow v. Tift*, 15 Johns. 459.

⁴¹ *King v. Stetson*, 11 Allen, 407; see, also, *Scribner on Dower*, 555.

⁴² *Stewart, Husband and Wife*, sec. 258; *Scribner on Dower*, 441, 555.

⁴³ *Crafts v. Crafts*, 2 McCord. L. 54.

⁴⁴ 1 Jones Mort, sec. 464.

⁴⁵ 4 Kent Com. 38; *Maybury v. Brien*, 40 U. S. 21; *Bullard v. Bowers*, 10 N. H. 500.

and enforced as a provision for the wife on the decease of the husband. But it is not such an interest as the wife can control by way of active interference in the realty, during coverture. The husband retains, for all practical purposes, the direction of the estate, and the wife, in harmony with other common law precepts, is considered as a cypher unless she should have the hardihood to survive him. There are, however, certain well recognized methods by which the dower interest may be effectually barred, during coverture, even as when the wife executes a formal release of the interest, which is only made to the one who holds the estate in which the right might otherwise be asserted. This mode is held to be exclusive.⁴⁶

The last case cited holds that a married woman, during the husband's lifetime, cannot convey her inchoate right of dower and she is not estopped even by the solemn recitals of her own deed, from asserting her right and she may also successfully contest any attempt, on the part of the grantee, to require her to refund the consideration paid. The conveyance is simply void for any purpose except as cumulative evidence of the purchaser's imbecility in attempting to create an interest that the law will not uphold. The inchoate right of dower is a valuable right which will be guarded and preserved. This right of the wife appeals as strongly for judicial protection as the vested rights of the widow. Notwithstanding this dictum it is held that the wife has no interests in the lands of her husband that requires compensation to be allowed her where such lands are seized by virtue of the eminent domain.⁴⁷

The right of the wife to an interest in the real estate of the husband is contingent, and is not a vested or existing right such that the Legislature may not at any time modify, change, or entirely abolish.⁴⁸

⁴⁶ *Mason v. Mason*, 140 Mass. 63.

⁴⁷ *Simar v. Canaday*, 53 N. Y. 298; *Moore v. The Mayor*, 8 N. Y. 110; *Mills v. Van Voorhies*, 20 N. Y. 412.

⁴⁸ *Connor v. Elliott*, 59 U. S. ; 18 How. 591; 15 L. Ed. 497; *Barbour v. Barbour*, 46 Me. 9; 1 *Woerner*

American Law of Administration, 225; *Ligare v. Semple*, 32 Mich. 438; *Bennett v. Harns*, 51 Wis. 251; *Wallace v. Reddick*, 6 West. Rep. 769; 119 Ill. 151; *United States v. Fox*, 94 U. S. 315; 24 L. Ed. 192; *Cooley Const. Lim.* 360, 361.

McLean J., in *Johnston v. Vandyke*, 6 McLean, 422, says: "It is not easy to define the right of dower before the death of the husband. It is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of her husband can she give it any form of property to her advantage. * * * So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right, if it may be called a right, is shadowy and fictitious, and, like all rights that are contingent, may never be vested."

In *Moore v. New York*, 8 N. Y. 110, the court says, in speaking of the inchoate right to a claim for dower, that it is a right "contingent upon the death of the husband. Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment. It is not of itself property, the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated so as to entitle the widow to demand and receive a freehold estate in the land."

In *Hinds v. Stevens*, 45 Mo. 209, Judge Bliss, in discussing the effect of a partition proceeding on this right says: "If the land be divided in *specie*, her inchoate right attached at once to the land thus set apart, to the husband in severalty; and if it be sold, I know not how it would be possible to so estimate the value of that shadowy right, as to pay her or invest for her any portion of the proceeds of the sale." And in *Durrett v. Piper*, 58 Mo. 551, the court, through Wagner J., says: "A dower interest upon the part of the wife, while the husband is living, is an inchoate and contingent right. Its value depends wholly upon the death of the husband. It is a mere possibility, which may be released, but cannot be the subject of the grant or assignment. The covenant being for an indemnity against a claim of dower, it is obvious that no breach could happen till the contingency arose which would legally vest in the wife a valid or substantial claim." From all the authorities, we conclude that the wife is not the owner of any estate or vested right in the property of which her husband is seized. But she is the owner of a contingent

interest to dower, however; and the question is whether the owner of such a contingency in real estate is an owner of property in such a sense as to require that she be made a party to a tax suit in order to bar that right.

"It is difficult," says Mr. Scribner,⁴⁹ "to state with precision the nature and quality of inchoate dower interest when considered as a right of property. It is 'a right attaching by implication of law, which although it may possibly be never called into effect (as when the wife dies in the lifetime of the husband), yet, from the moment that the fact of marriage and of seizin have occurred, is so fixed on the land as to become a title paramount to that of any other person claiming under the husband by a subsequent act.'⁵⁰ It is a substantial right, possessing in contemplation of law, attributes of property, and to be estimated and valued as such.⁵¹ It is not a lien." After this right has once attached, it is held by the wife entirely independent of the husband, and it cannot be affected by any act or omission on his part."⁵²

Upon general principles of equity, it is difficult to find a reason why an inchoate right of dower should not be protected against extinguishment by the foreclosure of a mortgage; especially where the husband has parted with his whole estate in the land, and can no longer be regarded as, in any sense, representing the interests of the wife. Coverture is no bar to the maintenance of a suit in equity, and it is the policy of our legislation to permit married women to assert, protect, and sue for their separate rights of property. A woman entitled to an inchoate right of dower cannot be regarded as "holding" under her husband, as she certainly has no estate in possession. But she may well enough be considered as "claiming" under him. When her dower is assigned, her estate is a continuance of her husband's. Her inchoate right of dower is a right of a very peculiar nature. It is a right of which nothing but her death or voluntary act can deprive her, and so it is something more than a mere possibility. Ordinary Statutes of Limitations do not run

⁴⁹ 2 Scribner, Dower, 5.

⁵⁰ *Shell v. Duncan*, 31 S. C. 565.

⁵¹ *Park, Dower*, 237; *Cunningham v. Shannon*, 4 Rich. Eq. 140.

⁵² *Shell v. Duncan*, *supra*, and cases there cited.

⁵¹ 2 Scribner, Dower, 5.

against it, so that adverse possession as against her husband will not deprive her of it. And although she cannot convey or alienate it, except by joining in a deed with her husband to release it, and cannot protect it from waste, and it is not liable to be taken by legal process, yet her husband cannot bar or encumber it. As was said by Chief Justice Parker in *Bullard v. Briggs*, 7 Pick. 533, it is "a valuable interest, which is frequently the subject of contract and bargain." "It is more than a possibility, and may well be denominated a contingent interest." In that case it was held that where a wife joined with her husband in releasing her dower to a mortgagee, and the husband, in consideration of such release, conveyed the equity of redemption to a trustee for her benefit, the conveyance could not be avoided by his creditors, if the value of the dower was equal to that of the equity conveyed.

In *Bacon v. Bowdoin*, 22 Pick. 401, it was decided that a tenant for years, or even the owner of a mere easement in land, might bring a bill to redeem a mortgage. And we think it could not be doubted that the owner of a life estate in remainder, or other contingent estate, might redeem. After the death of the husband, and before assignment of dower, the widow has no estate which she can enter upon or convey; yet undoubtedly she has an interest sufficient to support a suit for redemption.⁵⁴

In *Burns v. Lynde*, 6 Allen, 305, a wife having an inchoate right of dower was allowed to maintain a suit in equity to set aside a deed purporting to release her dower, which had been executed by her in blank and afterwards filled up; and a decree was made for a reconveyance to her of the right of dower by the grantee in the deed. That case goes very far in principle to sustain the conclusion to which we have come on reading the cases.

An inchoate right of dower is not defeated by a tax sale, instituted under a statute demanding such a sale, if the lien for the taxes attached after the dower right had become a fixity by the concurring facts of marriage and seizin on the

⁵⁴ *Eaton v. Simonds*, 14 Pick. 98; *Farwell v. Cotting*, 8 Allen, 211.

part of the husband.⁵⁵ And generally the widow is not chargeable with taxes or assessments.⁵⁶

An ordinary execution sale conveys to the purchaser all the right, title and interest of the defendant in execution, but it has no effect upon the inchoate dower of the wife. It was clearly the intention of the Legislature to give the same effect to a tax deed, under regular and valid proceedings, that a deed under a general judgment would have — “no more, no less.” “A tax title is a derivative title.”⁵⁷ Says Judge Black: “It must be taken as settled law that purchasers at these sheriff’s sales, made on executions in tax suits, acquire only the right, title and interest of the defendant in the tax suits.”⁵⁸

§ 85. Lex loci governs in all cases. It is an elementary rule of law that all regulations affecting real property are peculiar to the State in which such regulations originate, and the property itself is found. Our scheme of government would never tolerate the interference of one jurisdiction with another with regard to landed property situated in one State, and which the legislation of another State sought to regulate. Dower is in all instances under the absolute control of State legislation, and so long as this legislation does not contravene some expressed or implied recital of the organic or federal law it is of controlling weight in determining all questions relating to the topic. We must then look exclusively to the statutory enactments of the State for the rules governing dower, and we must always remember that those rules must be the ones that were in force at the time of the husband’s decease — an entirely new code may have gone into effect the day after his death, but the dower rights of his widow would be in no wise affected thereby.⁵⁹

§ 86. How barred, released or extinguished. The right may be defeated in various ways; as by the wife’s elopement

⁵⁵ *Shell v. Duncan*, 31 S. C. 565.

⁵⁶ *Taylor v. Bentley*, 3 Redf. 41.

⁵⁷ *Gitchell v. Kreidler*, 84 Mo. 472.

⁵⁸ *Powell v. Greenstreet*, 95 Mo. 13; *Evans v. Robberson*, 92 Mo. 192.

⁵⁹ *Sturtevant v. Norris*, 30 Iowa,

65; *Ware v. Owens*, 42 Ala. 212; *Burnett v. Burnett*, 46 N. J. Eq.

144; *Mitchell v. Word*, 60 Ga. 525;

Moore v. Kent, 37 Iowa, 20; *Lamar*

v. Scott, 3 Strob. 562; *Sutton v.*

Askew, 66 N. C. 172.

or adultery, by a joint conveyance duly executed and acknowledged, by marriage settlement, or ante-nuptial contracts, stipulating for the relinquishment of dower rights. It is also inoperative as to property foreclosed by virtue of a mortgage given for the purchase price of the estate; and as against a mortgage given before marriage. In some of the States a sale on execution by a referee or sheriff of the property in order to satisfy a debt, bars the dower interest and so of a sale to satisfy a delinquent tax. A dedication of the real estate for the uses of the public, is entirely free from all incumbrance in the way of dower, and similarly an equitable estoppel may be relied upon to defeat a dower right and a divorce *a vinculo*, in case the wife is the transgressor, will prevent the successful assertion of the claim. The right of dower being no part of the husband's estate is not defeated by insolvency proceedings against him.⁶⁰

The right may be defeated by any claim which would have defeated the husband's seizin at common law, by alienage — a rule now generally changed; by foreclosure of a mortgage made by him before marriage, or made for purchase money after marriage; in some States, by sale on an execution for a debt; by sale for taxes; by an exercise of the right of eminent domain; by dedication to a public use; but not by an assignment in insolvency or bankruptcy. The right may be barred by divorce *a vinculo*, she being the delinquent; by elopement and adultery; by a jointure; by a joint conveyance duly acknowledged — the common method; by equitable estoppel; or by taking what he wills her.⁶¹

Release of dower is not required in a conveyance of real property held by the grantor in his capacity of trustee and without any beneficial interest in himself.⁶² So, in a deed from joint tenants no release of the wife's dower is required; nor is it required in a conveyance of wild land; nor is a release of dower required when a jointure is settled upon the wife in lieu of her dower interest.⁶³

⁶⁰ Lazear v. Porter, 87 Pa. St. 513; Barth v. Lines, 118 Ill. 382; Lenow v. Fones, 48 Ark. 560; see Pomeroy's Eq. Jur., vol. 3, index; Story,

Eq. Jur., vol. I, sec. 624 et seq; 4 Kent, 35; Scribner on Dower.

⁶¹ Anderson's Law Dict.

⁶² 4 Kent's Com. 42.

⁶³ Id.

a. *By express agreement.* In New York it has been held that husbands and wives may legally contract with each other in reference to their separate estates.⁶⁴ That they may become agents for each other.⁶⁵ That a husband may assign to his wife a chose in action,⁶⁶ and it has been recently held that the common law disability of a married woman to engage in a business as a copartner or jointly with her husband, was removed by chapter 90 of the Laws of 1860.⁶⁷ Under these decisions if a married woman can release her dower rights through an attorney, she can appoint her husband such attorney.

Mr. Bishop says: "It is duly affirmed that the law absolutely casts upon the wife an estate in the lands of the husband, whereas it does not undertake to do so where, by agreement, the parties have the fixed rule which shall govern. The law operates in cases where there is no contract, but does not operate where the parties have for themselves agreed upon the mode in which marital rights shall attach. The law does not assume to override the agreement of the parties, but to furnish a rule where there is no agreement. To be sure, there must be an effective agreement or conveyance. If there is not, the law will prevail. There is little, if any, diversity of opinion upon the general proposition that parties may, by contract, intercept the line of descent, although there is some conflict as to what must be shown to support the contract. The rule long has been that dower and kindred rights may be excluded by the contract of the parties."⁶⁸

Speaking of contracts of this class, Mr. Bishop says: "It is doing what is done every day in other things, namely: providing a rule by agreement to be applied instead of the rule which the law would furnish in the absence of an agreement."⁶⁹

b. *By equitable estoppel.* Before the principles of equity jurisprudence became firmly established in this country, it was

⁶⁴ Owen v. Cawley, 36 N. Y. 600;
Bodine v. Kileen, 53 N. Y. 93.

⁶⁵ Knapp v. Smith, 27 N. Y. 277.

⁶⁶ Seymour v. Fellows, 77 N. Y.
178.

⁶⁷ Snow v. Caffé, 122 N. Y. 308; 9
L. R. A. 593.

⁶⁸ Id.

⁶⁹ 1 Bishop, Married Women, sec.
418, 427.

quite fashionable in legal circles to indulge in long tirades upon the general odiousness of the rules of estoppel. But, fortunately, with the continued exposition of the true principles that underlie the doctrine of estoppel, the former prejudice is fading away. It is now generally admitted that the old theory of the common law as to the oneness of husband and wife is no longer tenable, and consequently we are obliged to recognize the force and legality of contracts made between them. It is undoubtedly competent for a wife to enter into an agreement, ante-nuptial or otherwise, by which, for a valuable consideration, her right of dower may be defeated through the application of the principles of estoppel.⁷⁰ And the celebrated case of *Yale v. Dederer*, 68 N. Y. 329, places this right of contract and the rule in estoppel solely on the ground that the enabling acts have given her the right to contract with reference to any interest, legal or equitable that she may hold. We need not pursue this subject further, as the proposition is not disputed by any recent case in this country.

In *Gilbert v. Reynolds*, 51 Ill. 513, it was held that a widow may by her laches, estop herself from claiming dower, and in *Collins v. Wood*, 63 Ill. 285, and *Allen v. Allen*, 112 Ill. 323, it was held that acts and conduct sufficient to constitute an equitable estoppel would bar the right. In *Hoppin v. Hoppin*, 96 Ill. 265, it was held that her covenant of warranty against all incumbrances would operate to prevent her from afterwards setting up a claim of dower. In *Torey v. Minor*, 1 Smedes & M. Ch. 489, it was held that a covenant of the ancestor of the widow barred her claim to dower. And in *Skinner v. Newberry*, 51 Ill. 203, where moneys were due the testator at his decease upon executory contracts for the sale and conveyance of real estate, it was held that the widow "by claiming her share of the purchase money, cuts off her right of dower in the lands sold."

The widow's right of dower is unaffected by a sale of the property unless she bars her right by some act which, in a court of equity, would constitute it a fraud in her to insist upon it. All purchasers are supposed to examine the records

⁷⁰ *Elmendorf v. Lockwood*, 57 N. Y. 322.

and know what they are buying and to purchase with a knowledge of the state of the dower interest. The familiar maxim "*caveat emptor*" applies, and if they blindly bid off the land without inquiring whether the widow has relinquished her dower rights, or consented to a sale by electing to take a share of the proceeds in lieu thereof, it is their folly and they have no one to blame but themselves."⁷¹

A woman cannot, under the New York statutes, enforce dower rights in land purchased with her husband's money and conveyed to a third person, who has contracted in writing to permit the husband to receive all the benefit of and have full control over the property."⁷²

It is very logical from the principles already stated to formulate the rule that a married woman who relinquishes her right of dower in the lands of her husband shall not be heard to dispute the deed by which such relinquishment was accomplished."⁷³ There is, however, a species of conveyance, quite common in actual experience, where the wife joins in a conveyance of the husband's realty with the intent upon his part to defraud his creditors. The question — and it is an important one — is "can the wife be estopped to claim dower against a purchaser for a valuable consideration from the grantee?" The decision of Allen G. Thurman, when chief justice of Ohio, in the celebrated case of *Woodworth v. Paige*, 5 Ohio St. 70, is illustrative of the learning upon this question. His honor says: "It would seem obvious that if the deed of the husband and wife was executed for a sufficient consideration, and was invalid only by reason of the intent to defraud creditors, she ought to be barred of her dower as against the grantee and his privies. For as between her and them, there is no reason why her release, made for a sufficient consideration, should be avoided. But the case is quite different, I apprehend, where there is no consideration to uphold the deed; and it can only be upheld by the application of the doctrine that as between fraudulent grantor and grantee, the title of the latter is good. For why, and in what sense is the deed fraudulent? And

⁷¹ *Owen v. Slatter*, 26 Ala. 547.

⁷³ *Usher v. Richardson*, 29 Me.

⁷² *Phelps v. Phelps*, 143 N. Y. 415; *Farley v. Eller*, 29 Ind. 322.

why is it that the title of the grantee, who has paid no consideration, is nevertheless good? It is fraudulent simply because it is an attempt to place the property beyond the reach of the husband's creditors; and the title of the grantee is good, except as against the creditors, simply because no court will aid a party to avoid his executed contract made for a fraudulent purpose. But so far as the wife is concerned, she places nothing beyond the reach of the creditors to which they are entitled. It is the husband's estate alone, and not her dower right, that is liable for his debts, and that estate he can convey without her joining in the deed. Her execution of the deed adds nothing to its efficacy so far as his estate is concerned; it simply releases her dower, which the creditors have no right to touch. How then can it be said that she is a fraudulent grantor? Whom does she defraud? Either by deed or by avoiding it so far as to claim dower? Not the creditors, for they had no right to her dower. Not the grantee, for he paid no consideration for the conveyance. Not a purchaser with notice from the grantee, for such purchaser is in no better condition than the grantee himself. How then, can it properly be said that the deed is her executed, fraudulent contract or conveyance, against which she ought not to be relieved, when its execution does not, and cannot defraud anybody?" This reasoning seems invulnerable and embodies a rule of real property that must be of frequent application. A failure to observe it has led to rank injustice, as it has been supposed by many lawyers skilled in the law of real property that her deed executed under such circumstances will estop all assertion of any interest in the estate conveyed, whereas, her dower rights remain intact and can be enforced before the appropriate tribunal.

c. *By joint conveyance, how barred or released.* In the vast majority of cases, dower is barred by the wife's joining with the husband in the alienation of the property. The deed or instrument of conveyance should contain a specific recital to the effect that the wife relinquishes all right of dower to the premises, and in most of the states it is the duty of the officer taking the acknowledgment, to certify that on a separate examination, apart from her husband, the wife, being duly apprised of the nature of the instrument, admitted that she

signed it for all the purposes therein expressed. This is decidedly the better method, but there are cases holding that these latter formalities may be dispensed with, and resort had to the facts surrounding the transaction to show that she intended to release her dower interest.⁷⁴ Generally the law will not indulge the presumption that she intended to release her dower interest where the deed itself is silent on the subject.⁷⁵ The statutes vary on this subject, and the statutory requirements in the various States should be strictly observed.⁷⁶ But if the wife be an infant her right of dower is not barred by joining in the conveyance with her husband.⁷⁷ There are two well known maxims of the common law that are very much in evidence in this connection, viz., No right can be barred until it is accrued, and no title to a freehold can be barred by a collateral satisfaction. Dower may be barred by the jointure, but this subject will be treated specifically.⁷⁸

Dower, release of. If a married woman of sufficient mental capacity, without duress or misrepresentation as to the nature of the instrument, joins in a deed of her husband's to release her dower, and suffers it to be delivered to the grantee, she cannot afterwards avoid it on the ground that she was induced to execute it by fraud or undue influence of her husband, or of another co-grantor, without showing that the grantee knew of or participated in the fraud.⁷⁹

It has been said that a wife cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person.⁸⁰ The release must, at all events, accompany or be incident to the conveyance to another. And the right of dower again attaches, upon a reconveyance of the real estate to the husband, or upon his becoming in any other manner vested in his own right with the title thereto.⁸¹ And if the conveyance is declared to be void or ceases for any

⁷⁴ Birge v. Smith, 27 N. H. 332.

⁷⁵ Westfall v. Lee, 7 Ia. 12.

⁷⁶ Grove v. Todd, 41 Md. 633; Carson v. Murray, 3 Paige Ch. 483; Belcher v. Weaver, 46 Tex. 293.

⁷⁷ Priest v. Cummings, 16 Wend.

617; Sandford v. McLean, 3 Paige Ch. 117.

⁷⁸ 1 Cruise's Dig. 213.

⁷⁹ White v. Graves, 107 Mass. 305.

⁸⁰ Carson v. Murray, 3 Paige, 483.

⁸¹ Id.

reason to operate, and no title has passed, or none remained, the release of dower does not operate against the wife and she is again clothed with the right which she had released. Such is the familiar case of a wife joining with her husband in the execution of a mortgage, and thereby releasing her right of dower. On the satisfaction of the mortgage her right is restored. And so where a deed has been executed by the husband with full covenants, in which the wife has joined and afterwards the grantee has sued for a breach of the conveyance, and has recovered full damages, it has been held, the husband dying, that the widow has a right of dower in the premises.⁸² The principle which governs is this: The release of an inchoate right of dower operates against a married woman only by way of estoppel. An estoppel must be reciprocal, and binds only in favor of those who are privy thereto. Such a release can be availed of only by one who claims under the very title created by the conveyance, with which the release is joined. A release to a stranger to that title does not extinguish the right of dower.⁸³

d. *By acceptance of testamentary provision.* It must never be inferred that the law will sanction the acceptance by the widow of a provision made by a testate husband, and at the same time and in addition thereto, extend to her the right of dower; one or the other must be relinquished, she cannot have both, and, as we have seen in a previous section, she must exercise her right of election. It will be seen then that a widow by accepting the provisions in her favor contained in her husband's will, is barred of her dower right. This rule is universal.

e. *By divorce, adultery, etc.* A divorce a *vinculo matrimonii* bars the right of dower, but in those States where such divorce is authorized by statute, provision is made for preserving the dower right of the wife, unless the divorce be granted for her misconduct.⁸⁴

⁸² Stinson v. Sumner, 9 Mass. 143.

⁸³ Harriman v. Grey, 49 Me. 537.

⁸⁴ McCraney v. McCraney, 5 Ia. 232; Dobson v. Butler, 17 Mo. 87; Whitsell v. Mills, 6 Ind. 229; Burdick v. Briggs, 11 Wis. 126; Miltimore v. Miltimore, 40 Pa. 151; Rice v. Lumley, 10 Ohio St. 596; Schiffer v. Pruden, 64 N. Y. 47; Forrest v. Forrest, 6 Duer, 102; McCafferty v. McCafferty, 8 Blackf. 218; Davol v. Howland, 14 Mass. 219; Gleason

more v. Miltimore, 40 Pa. 151; Rice v. Lumley, 10 Ohio St. 596; Schiffer v. Pruden, 64 N. Y. 47; Forrest v. Forrest, 6 Duer, 102; McCafferty v. McCafferty, 8 Blackf. 218; Davol v. Howland, 14 Mass. 219; Gleason

A divorce *a mensa et thoro* is not a bar of dower.⁸⁵

In the leading case of *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274, the husband had been married in the State of Ohio in the year 1871, and thereafter the married couple resided in the State of New York. Some time afterwards the wife returned to the State of Ohio, and began her action against the husband for an absolute divorce on the ground of gross neglect of duty. The husband was domiciled in the State of New York during the pendency of such divorce proceedings in the State of Ohio, and did not appear in or plead to such action. Divorce was granted. The husband, still domiciled in the State of New York, after such judgment of divorce, married again, whereupon he was indicted in the court of New York for bigamy. Being convicted, an appeal was taken. Thereafter the appeal from such judgment was finally considered in the Court of Appeals of the State of New York, and the conviction was then affirmed. The court, among other things, considered fully the question: "Can a court in another State adjudge to be dissolved, and at an end, the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" The court answered this question squarely in the negative, and that, too, after reviewing the federal decisions bearing on the subject. Many citations are made of New York decisions and those of other States by Judge Folger, who pronounced the judgment of that court. So, too, in the case of *Jones v. Jones*, 108 N. Y. 415, although the Court of Appeals of New York upheld a divorce of a New York marriage by the courts of Texas, it was done because the

v. Emerson, 51 N. H. 405; Gould v. Crow, 57 Mo. 200; Calame v. Calame, 24 N. J. Eq. 440; Lakin v. Lakin, 2 Allen, 45; Wait v. Wait, 4 N. Y., 95; Kade v. Lauber, 16 Abb. Pr. (N. S.), 288; 48 How. Pr. 382; Young v. Gregory, 46 Mo. 475.

⁸⁵ Clark v. Clark, 6 Watts & S.

85; Crain v. Cavana, 36 Barb. 410; Dean v. Richmond, 5 Pick. 461; Gee v. Thompson, 11 La. Ann. 657; Watkins v. Watkins, 7 Yerg. 283; Walsh v. Kelly, 34 Pa. 84; Thayer v. Thayer, 14 Vt. 107; Bryan v. Batcheller, 6 R. I., 546; Seagrave v. Seagrave, 13 Ves. Jr. 443.

husband, who was domiciled in the State of New York when the wife began her action for divorce in the courts of the State of Texas, appeared in said action, and answered to the merits of the action. The Court of Appeals of the State of New York was careful to announce in its judgment "that the marriage relation is not a '*res*' within the State of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service, or actual notice of the proceeding, given without the jurisdiction of said court; and, like other contracts, the contract of marriage cannot be annulled by judicial sanction without jurisdiction of the person of the defendant." And also the case of *Williams v. Williams*, 130 N. Y. 193; 14 L. R. A. 220, decided in December, 1891, is in point, as illustrating the attitude of the courts of New York on this question of divorce, so far as concerns a judgment rendered by the courts of a State different from that in which the domicil of the defendant was had, and to which action for divorce he neither appeared nor answered.

Mr. Joel Bishop in his recent elaborate work on "Marriage, Divorce and Separation," says (vol. 1, § 1523): "In law and commonly in morals, adultery in one of the married parties is deemed the highest matrimonial offense against the other, and wherever the right to dissolve the marriage bond is acknowledged, adultery is accepted as adequate cause for it. In a part of our States it is a crime punishable by indictment. To be ground for divorce it must partake of the criminal quality, so that the carnal act committed by an insane person, or through an innocent mistake of facts, will not suffice. By an ancient English statute, which is accepted as common law in considerable numbers of our States, and with more or less modifications re-enacted in most of the others, it bars dower though there has been or can be no divorce for it."⁸⁶ According to a Delaware case, a wife does not forfeit dower, by eloping from her husband and living in adultery

⁸⁶ The distinguished author cites in support of these assertions *inter alia* *Giles v. Giles*, 22 Minn. 348; *Cogswell v. Tibbetts*, 3 N. H. 41; *McAllister v. Norvenger*, 54 Mo. 251; *Thornburg v. Thornburg*, 18 W. Va. 522; *Gaylor v. McHenry*, 15 Ind. 383; *Earle v. Earle*, 9 Tex. 630; *Sistare v. Sistare*, 2 Root, 468; *Polier v. Barkley*, 15 Ala. 439.

with another man, if the husband was guilty of adultery and caused her to leave him by his cruelty, neglect, and abandonment.⁸⁷ It is now held in Massachusetts that elopement and living in adultery do not bar dower.⁸⁸ Mr. Bishop will be recognized as abundant authority for the statement that the statute of Westminster 2 (13 Edw. I stat. 1) c 34, is not received as law in Massachusetts, Missouri, Rhode Island or Iowa, but is accepted or re-enacted in some other of our States, though not in identical terms; as for example, South Carolina, New Hampshire, Minnesota, Missouri, North Carolina and West Virginia.

Kent says that the statute of Westm. made adultery of the wife accompanied by elopement, a forfeiture of dower by way of penalty; but reconciliation with the husband would reinstate the wife in her right. The statute of Westminster was re-enacted in New York in 1787, but has undergone very serious modification under the code. The same provision was made by statute in Connecticut; and there is so much justice in it, that an adulterous elopement is probably a plea in bar of dower in all the States in the Union which protect and enforce the right of dower. New York must be considered an exception, that there the wife only forfeits her dower in cases of divorce *a vinculo* for misconduct, or on conviction for adultery on a bill in chancery by the husband for a divorce,⁸⁹ and a note to the tenth edition states that, by the laws of Maine, a woman divorced from her husband because of his drunkenness is dowable in his estate. In New Jersey a decree of divorce *a vinculo* for the fault of the wife, forfeits her dower. So does a voluntary elopement with an adulterer, or consent to a ravisher unless her husband be reconciled to her, and suffer her to live with him.⁹⁰

In an Upper Canada case (*Graham v. Law*, 6 U. C. 310) it was held that where the husband deserted his wife and then she lived in adultery she was held not to be barred and this view is receiving quite general recognition.⁹¹

In *Wait v. Wait*, 4 N. Y. 95, the court, overlooking *Day v. West*, 2 Edw. Ch. 592; 6 L. ed. 515, and *Reynolds v. Reynolds*,

⁸⁷ *Rawlins v. Buttell*, 1 Houst.

⁸⁹ 4 Kent, 54.

224.

⁹⁰ Elmer's Dig. 145.

⁸⁸ *Lakin v. Lakin*, 2 Allen, 45.

⁹¹ See *Elder v. Reel* 62 Pa. St. 308.

24 Wend. 193, "held that a judgment dissolving a valid marriage for the adultery of the husband did not cut off the wife's inchoate right to dower in lands of which he was at the date of the judgment or theretofore, had been, seized." In speaking of the decree dissolving the marriage in that case, the court said: "The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties, to the extent declared by statute. * * * It is true that the decree is that the marriage be dissolved, and that each party be freed from the obligations thereof. This dissolution and release, however, is not absolute. The wife, when the husband is the guilty party, is still entitled to her support; and the obligation of the marriage still rests upon the husband so far as to render it unlawful for him again to marry. When the wife is the guilty party, the marriage still continues in force so far as to give the husband a title to her property, and to render it unlawful for her to marry. As a further penalty for the offense, the Legislature have declared that when the wife is convicted of adultery she shall not be entitled to dower in her husband's real estate."

Holding that a decree of divorce has no other effect than that declared by the statute, and finding that the dissolution of marriage by the decree was not absolute, but that the obligation of marriage, according to the statutes of New York, still rested upon the husband so far as to render it unlawful for him again to marry, the court rested its decisions in *Wait v. Wait*, on the ground that the section which provided that, "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed," by denying a wife's right to dower when divorced for adultery, by fair implication saved it when a divorce was granted for the adultery of the husband. This decision, even under the peculiar laws of New York, has been questioned."

It has generally been held that a valid divorce cuts off the wife's right of dower unless expressly or impliedly pre-

" Moore v. Hegeman, 27 Hun, 70, 12 L. R. A. 359; 2 Bishop, Mar., affirmed 92 N. Y. 521; 44 Am. Rep. Div. & Sep., sec. 1635. 408; Price v. Price, 124 N. Y. 599,

served by statute."⁹³ That divorce does not bar dower has also been held in a number of cases."⁹⁴ The adultery of the wife without divorce is no bar to the right of dower in Iowa or in Maine."⁹⁵ And in Indiana the right of a surviving wife can only be defeated by showing that at the time of her husband's death she was living apart from him in adultery."⁹⁶ A woman who has been divorced from her husband cannot be deemed "a surviving wife," but unless there has been a judicial decree dissolving the marital relation, the wife who outlives the husband is the "surviving wife" within the meaning of the Indiana statute, no matter how bad her conduct may have been."⁹⁷

Under well recognized postulates of the old common law adultery was not a bar to dower; for says Lord Coke: "It is necessary that the marriage do continue, for if that be dissolved the dower ceases, *ubi mat nullum matrimonium, ibi lulla dos*. But this is to be understood where the husband and wife are divorced *a vinculo matrimonii*, as in the case of pre contract, consanguinity, affinity, etc., and not *a mensa et thoro*, only for adultery."⁹⁸ But the law was changed in this respect by the statute of Westminster, 13 Edw. I, st. 1, c. 34, by which it was provided that "if a wife willingly leave her husband and go away with her adulterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convicted thereupon, except that he willingly and without coercion of the church, reconcile her and suffer her to dwell with him; in which case, she shall be restored to action." As well by the express words of this statute as the uniform construction put upon it by the courts, elopement, or to speak more

⁹³ Barrett v. Failing, 111 U. S. 523; Boyles v. Latham, 61 Ia. 174; Marvin v. Marvin, 59 Id. 699; 3 Wait's Act. & Def. 661.

⁹⁴ Williams v. Hale, 71 Ala. 83; Jarnigan v. Jarnigan, 12 Lea. (Tenn.) 292; Stilson v. Stilson, 46 Conn. 15.

⁹⁵ Littlefield v. Paul, 69 Me. 527; Smith v. Woodworth, 4 Dill. 584.

⁹⁶ Wiseman v. Wiseman, 73 Ind. 112; 38 Am. R. 115; Shaffer v.

Richardson's Adm'r, 27 Ind. 122; see also Payne v. Dotson, 81 Mo. 145; 51 Am. R. 225; Heslop v. Heslop, 82 Pa. St. 537; Walters v. Jordan, 13 Ired. 361.

⁹⁷ Wiseman v. Wiseman, 73 Ind. 112; 8 Wait's Act. & Def. 313.

⁹⁸ Co. Litt. 32, a; 2 West, 435; Sir William Grant in Seagrave v. Seagrave, 13 Ves. 443; Bryan v. Bachseller, 6 R. I. 546.

accurately, a voluntary separation, or departure of the wife from the husband, as well as adultery, is necessary to make the bar complete."

f. *By proceedings in the nature of eminent domain.* "One mode in which dower may be defeated remains to be mentioned, and that is by the exercise of eminent domain during the life of the husband, or what is equivalent to it, dedication of land to the public use. This grows out of the nature of the wife's interest in the lands, and whether it is such as ought to be regarded in giving compensation. * * * *Moore v. New York*, 4 Seld. 110; *Gwynne v. Cincinnati*, 3 Ohio, 24. The principle involved in the above and similar cases is a pretty important one, nor has it been heretofore well defined. * * * It is difficult to see why it should not apply in all cases where the law authorizes the husband's land to be taken in *invitum*, and compensation therefor made for the fee of the same, as for instance, in those States where the mill owner is authorized to flow lands which he does not own. At common law a widow cannot have dower of a castle, since among other reasons, she could not put it to profitable use, and the same reasoning would apply as to lands, though granted by the husband, which have been appropriated to public uses, such as cemeteries, public parks and the like."¹⁰⁰ Treating of the same point, Judge Dillon says: "As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the Legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title divested of any inchoate right of dower. Nor is a widow dowable of lands dedicated by her husband in his lifetime to the public, where the dedication is complete, or has been accepted and acted upon by the municipal authorities."¹⁰¹ In a recent work of pronounced merit, it is said: "A married woman cannot claim dower in lands dedicated by her husband to the public.

⁹⁹ Co. Litt. 32, b; 2 Inst. 405; see *Cogswell v. Tibbits*, 3 N. H. 41; *Shaffer v. Richardson*, 27 Ind. 122; *Walter v. Jourban*, 13 Ired. 361.

¹⁰⁰ 1 Washb. Real Prop. (5th ed.), 279.

¹⁰¹ 2 Mun. Corp. (4th ed.), sec. 594.

It is settled that dower is created by law, and does not exist by virtue of contract and that it is therefore within the power of the Legislature to change or destroy the rights of a married woman at any time before they have vested. This rule prevails where dower has been abolished and estate in fee substituted. Dedication of land to public use is placed upon the same general principle as that on which rests the right of eminent domain, and it is held that the property interests of the married woman must yield to public necessity."¹⁰² Another author says: "An inchoate right of dower may be taken during the lifetime of the husband, on giving full compensation to the husband. The inchoate right of dower is not such an interest as is capable of assessment. During the life of the husband he represented the fee, and compensation to him appropriated the fee. It has been well held, when an estate is taken before the decease of the husband, the value of the widow's inchoate right of dower is deemed too uncertain to admit of compensation; that the husband must be regarded as the owner of the entire estate; and that as such he is entitled to full compensation for it."¹⁰³

§ 87. Doctrine of election examined. A party cannot be indulged in a vacillating and inconsistent position with reference to his legal rights, and where he has the option of several courses and deliberately selects one he is confined to the selection and will not be heard to dispute or abandon it in favor of some other selection that the logic of events has made more desirable. Any decisive line of conduct that discloses an intention to adopt a certain position, if entered into with a full knowledge of his rights, will create an estoppel.¹⁰⁴ The peculiar hardships of this rule have been illustrated by a decision of the Supreme Court of Ohio, where the rule was invoked by the proponents of a will under which the widow of the testator had made an election to accept the provisions therein contained in her favor; subsequently she sought to annul her election and demand her dower rights, the court say: "We hold that the election of the widow to take under

¹⁰² Elliott, Roads & Streets, 108.

¹⁰⁴ Rodermund v. Clark, 46 N. Y.

¹⁰³ Mills, Em. Dom. (2d ed.), sec. 354.

the will does not estop her from contesting the will, denying the validity of its devises, or setting up her claim as heir. She can do all or either of these without having her election set aside. Her right to elect is the creature of statutory law, and we must look to the statutes creating it alone, for the estoppel it is to work. These statutes make her election to take under the will a bar to dower, and to her distributive part of the personal estate due her as widow, and to nothing else. A contrary reading of the statutes would, in many instances, result in the greatest injustice to her. She is compelled to make an election and is only allowed one year for that purpose. The heirs may contest the will, or not, at their discretion, and they are allowed two years in which to commence the contest. How can the widow know, at the time of making her election, whether there will be a contest? And if she could know that, must she at her own peril, predetermine the rights of the parties thereto. There would be no safety to her in such a construction of the law. She might validate the will by such an election, and the heirs invalidate it by a contest. It would then seem to be a will as to her, and no will as to them. On the other hand should she decide that the will was invalid, and would be set aside, and therefore decline to take under it, the will might ultimately be established, and she be made to lose all benefit, however great, of its provisions in her favor. Thus an election which was intended for the benefit of the widow would become a means to entrap her, and would render her right uncertain and impracticable. Such is not the law. If there is no valid will there is no valid election, and of course no estoppel or bar, and it matters not whether the invalidation takes place before or after the election, or at whose instance it takes place. It is only in the event that the document probated becomes or remains established as a valid will that her election can have any effect whatever, and when such is the case, the effect of the election is confined to her rights as widow, and cannot reach her rights as heir to property not effectually and legally disposed of by the will."¹⁰⁵

Dower is a clear legal right, and cannot be divested except upon full knowledge of the widow's rights; and if, in ignor-

¹⁰⁵ *Carder v. Fayette Co.* 16 Ohio St. 353.

ance of the extent of the estate, the widow accept a provision of her husband's will in lieu of dower, she may, even after the lapse of years, renounce under the will, and claim her dower.¹⁰⁶

If the provisions of the will manifest a clear intent on the part of the testator to bar the dower right it is sufficient, without express declaration, to put her to an election between the provisions of the will for her benefit and those provided for her by statutory law.¹⁰⁷ Where there is a manifest incompatibility between the dower right and the recitals of the will — in other words, a clear repugnancy between the two claims — both cannot stand but the widow must elect between them.¹⁰⁸ This proposition is elementary and authorities are superfluous. A devise in lieu of dower is the price put by the testator himself on that right¹⁰⁹ and the intention to exclude this right of dower is to be gathered from the will alone.¹¹⁰

The widow may be entitled to dower where she takes other real estate devised to her under the same will unless there be an express provision in the will to the contrary, or by so doing she will defeat the operation of some other provision in the instrument.¹¹¹

Judge Wørner, in his *Law of Administration*, p. 119, says on this subject: "The rejection by the widow of the provisions made for her by will generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is that the devise or legacy which the widow rejects is to be applied in compensation to those whom her election disappoints." To the same effect are *Wood v. Wood*, 1 Met. [Ky.], 512, and *Dean v. Hart*, 62 Ala. 308. This same result in principle is reached by accelerating the enjoyment of the remainder, when the election of the

¹⁰⁶ *United States v. Duncan*, 4 McLean, 99.

¹⁰⁷ *Brokaw v. Brokaw*, 41 N. J. Eq. 403.

¹⁰⁸ *Pratt v. Douglass*, 38 N. J. Eq. 536; *Konvalinka v. Schlegel*, 104 N. Y. 130; *O'Brien v. Elliot*, 15 Me. 125; *Cunningham v. Shannon*, 4

Rich. Eq. 150; *Warren v. Morris*, 4 Del. Ch. 289; 1 Pom'y Eq. Jur. sec. 139, 488, 493, 550; 4 Kent's Com. 58.

¹⁰⁹ *Scribner on Dower*, 496.

¹¹⁰ *McGee v. Hall*, 26 S. C. 182.

¹¹¹ *Daugherty v. Daugherty*, 69 Ia. 677.

widow only affects equally those to whom the remainder is given."¹¹²

Van Steenwyck v. Washburn, 59 Wis. 483, 505. In this case it was said by Cole, J.: "Independently of the statute, probably no one would question the power of a court of equity, where the application was in time, to elect for an insane widow, or other person incapable for want of capacity of personally making it. Such a power has often been exercised by courts of chancery in England and in this country, and the jurisdiction is well established. Does, then, the statute which requires the widow to elect, limit or abrogate this jurisdiction, so that a court can no longer exert it on behalf of an insane widow? We perceive no sufficient ground for saying that it does. The object of the statute is to regulate dower, declare when and under what circumstances it shall exist, define its extent, and prescribe the manner in which it may be barred. True, it provides that when the widow is put to an election she shall be deemed to have elected to take the jointure, devise, or other provision, unless, within a year from the death of her husband, she file a notice that she elects to take the share of his estate which the law gives her. But we do not think it was the design of the statute to abrogate the jurisdiction of a court of equity in a proper case. Such an inference should not be made without a clear expression of such legislative intent."

The court said in this case: "Prior to the adoption of the statute fixing the time within which the widow is required to make the election, although she was then, as now, compelled to elect between a provision made for her in lieu of dower and her right to dower, still if she, in making the election, acted in ignorance of her rights, and had no means of knowing what they were, a court of equity would grant her relief; and in cases where no election had or could be made, for the reason that the widow could not ascertain or know the condition or character of the estate, the chancellor postponed her election until an account was taken and the condi-

¹¹² *Fox v. Rumery*, 68 Me. 121; *Armstrong v. Park*, 9 Humph. 195; *State v. Smith*, 16 Lea. 662; *Hol- Capron v. Capron*, 6 Mackey, 225; *derly v. Walker*, 56 N. C. 46; *Rob- 12 Cent. Rep. 43.*
inson v. Harrison, 2 Tenn. Ch. 11;

tion of the estate ascertained. * * * If a court of equity, after an election has been made by the widow, will, upon a state of case showing that she has been imposed upon, or has made her choice when in ignorance of the condition of the estate and without the means of ascertaining it, relieve her in order that the election may be made understandingly, we see no reason why before an election is made, although the time may be limited by statute, relief may not be granted when the chancellor himself sees that no intelligent choice can be made. It is obvious in the present case that the provision of the will is much more beneficial than the dower, and it would be not only a great hardship on the widow, but a violation of a plain rule of equity, to deprive her of the property intended for her use and benefit by her husband, in requiring an election to be made when the whole estate is imperilled by litigation, and so unsettled as to preclude the chancellor, even if he desired, from making a judicious choice for her."

The widow's statutory rights in her husband's estate are paramount to his will, and he is presumed to know that fact. It is, therefore, not accurate to say that his whole scheme of disposition of his property is destroyed by the widow's election. It is disarranged *pro tanto* but, in the absence of any reference to such contingency or provision for it in the will, there is ordinarily nothing on which to found a presumption that he would have made any specific difference in distribution had he known she would exercise her right — certainly not that he would have decreased any of the definite pecuniary legacies to swell the amount going at the end of the list to the residuaries. No court is authorized to make a new distribution for the sake of equality. The testator's scheme must be carried out as he made it, except so far as that has been rendered impossible by the widow's action, and in so far a court of equity interferes to preserve an intent which would otherwise be sacrificed. Such interference is the pure creation of equity, and had its origin in the doctrine of equitable election, which compelled one taking a benefit under a will to acquiesce in other provisions of the same instrument which for any reasons were not binding upon him. Equity compelled him to elect and if he chose to assert his prior

rights against the will, the chancellor treated the provision of the will in his favor as forfeited, and then used the benefit created by such provision as a fund to be administered so as to carry out as nearly as might be the purposes of the testator, which would otherwise fail.

§ 88. **Widow entitled to know the facts before being bound by an election.** It would, indeed, be an anomaly if, after a combination of both law and equity to cast upon the widow certain privileges which are said to be highly favored, she should be compelled to accept her beneficial right in a blind and haphazard way without the least opportunity to inform herself of the various equities to which she is entitled, and to make an intelligent selection therefrom. We find nothing sanctioning such an iniquity in any system of jurisprudence. It is true the law compels an election between the testamentary devise and the statutory dower. It is true that the same law inexorably refuses to give her both, but it also compels all interested parties to respect her right of full information as to any and all facts which might reasonably be expected to influence an election. Generally, it may be said that she is not bound by an election made in ignorance unless she wilfully refuses to inform herself.¹¹³

It would seem to be a corollary from the above proposition that the widow is entitled to a reasonable time in which to make her election, and once having made it, after being placed in possession of the facts necessary to an intelligent choice, she makes a disadvantageous election through a mistake of law, she is still bound by it. Her ignorance of her legal rights will not shield her.¹¹⁴

The familiar doctrine of election as applied to wills may be thus stated: A beneficiary who chooses to accept the bounty of a testator must do so upon such terms and conditions as the testator has seen fit to impose. He cannot insist

¹¹³ *Reeves v. Garrett*, 34 Ala. 563; *219; Paton v. Bowen*, 14 R. I. 375; *Richart v. Richart*, 30 Ia. 465; *Millikin v. Welliver*, 37 Ohio St. 460. *Kreiser's App.* 69 Pa. St. 200; *Macknet v. Macknet*, 29 N. J. Eq. 34; ¹¹⁴ *Light v. Light*, 21 Pa. St. 407. *Pinckney v. Pinckney*, 2 Rich. Eq.

that provisions in his favor shall be enforced and that those to his prejudice shall be ignored or set at naught.¹¹⁵

Story, in his work on Equity Jurisprudence, § 1098, says: "The general rule is that the party is not bound to make any election" (where no time to make it is fixed) "until all of the circumstances are known, and the state and condition, and value of the funds are clearly ascertained, for until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him in reason and justice."¹¹⁶

In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with a full knowledge of all the circumstances and of her rights, and it must appear that she intended, by her acts, to elect to take the provision which the will gave her. These acts must be plain and unequivocal, and be done with a full knowledge of her rights and the condition of the estate. A mere acquiescence, without a deliberate and intelligent choice, will not be an election.¹¹⁷

The law is well settled by the uniform current of authorities that a bequest in lieu of dower, accepted by election, is so far based upon a valuable consideration that it has priority over all other legacies and will not abate with them.¹¹⁸

The general rule applicable to cases where a party is compelled to make election, is: If one should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund he elects to receive, it will not be conclusive on him.¹¹⁹ This rule is applicable to dower.¹²⁰

¹¹⁵ *Matter of Noyes*, 5 Dem. Rep., Surr. Ct. 313.

¹¹⁶ See also *Chitty on Cont.* 742, note; *Fireman's Ins. Co. v. Lawrence*, 14 Johns. 46.

¹¹⁷ 1 *Lead. Eq. Cas.*, title "Election;" *Anderson's Appeal*, 36 Penn. St. 476, 496; *Bradford v. Kent*, 43 Penn. St. 474; *English v. English*, 5 Green's Ch. 504; *O'Driscoll v. Roger*, 2 Dessaus. 295; *Wake v. Wake*, 1 Ves. Jr. 335; *Reynard v.*

Spence, 4 Beav. 103; *Tooke v. Hardeman*, 7 Geo. 20; *Dixon v. McCue*, 14 Grat. 540.

¹¹⁸ *Lord v. Lord*, 23 Conn. 327; *Security Company v. Bryant*, 52 Conn. 311.

¹¹⁹ *Wells v. Robinson*, 13 Cal. 133, 142; *Kerr on Fraud and Mistake*, 453; *Pusey v. Desbouveir*, 3 P. Wms. 315.

¹²⁰ *Hindley v. Hindley*, 29 Hun, 318; *Larabee v. Van Alstyne*, 1

When it appears from the face of the will of a deceased husband that the testator did not intend a provision which it contains for his widow to be in addition to her dower, but to be in lieu of it, and his intention disclosed in other parts of the will must be defeated by the allotment of dower to the widow, she must make her election, and either renounce her dower, or the benefit she claims under the will.¹²¹

§ 89. **Rules for estimating the value of the dower right.** In *Thornburn v. Doscher*, 32 Fed. Rep. 810, the precise question arose, and the court held that: "In estimating the value of a widow's dower in land aliened by the husband in his lifetime, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon." In *Allen v. McCoy*, 8 Ohio, 418, it is said: "In making assignments of dower, the rule of value is to be taken at the time of assignment, but all increased value from actual improvements on the ground is to be excluded." In *McClanahan v. Porter*, 10 Mo. 746, it was held that: "Where lands have increased in value from intrinsic causes not connected with the labor or expenditures of the alienee, the widow takes according to the value at the time of the assignment." In *Summers v. Babb*, 13 Ill. 483, it was held that "a widow is only entitled to take her dower according to the valuation of the land at the time of the alienation. She is not dowable of improvements put upon the land, but she is entitled to the benefit of its increased value, arising from other causes than the labor and expenditures of the alienee." In *Thompson v. Morrow*, 5 Serg. & R. 289; 9 Am. Dec. 358, Tilghman, Ch. J., discussing the point under consideration, said: "So far as concerns improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the

Johns. 307, 308; *Macknet v. Macknet*, 29 N. J. Eq. 54; 2 *Scribner on Dower* (2d ed.), 519, 523; *Cameron on Dower*, 489, sec. 94; *Id.*, 490,

sec. 97; *Richart v. Richart*, 30 Ia. 465; *Dabney v. Bailey*, 42 Ga. 521.
¹²¹ *Herbert v. Wren*, 7 Cranch. 370.

widow if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate which may arise either from public misfortune or the negligence, or even the voluntary act, of the alienee; for, although he destroys the buildings erected by the husband, the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband." And in *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 347; Fed. Cas. No. 11, 356, Mr. Justice Story, referring to the opinion in *Thompson v. Morrow*, supra, said: "This doctrine appears to me to stand upon solid principles and the general analogies of the law. If the land has in the intermediate period risen in value, she receives the benefit; if it has depreciated, she sustains the loss. If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes, it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land, and those which operate upon the whole. Upon the whole, my judgment is that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienees, leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements."

The depreciation in the value of land which is subject to dower after alienation by the husband whether from natural causes or from the mere negligence of the purchaser or alienee in keeping the property in repair is not sufficient cause for assigning compensation to the widow according to the value at the time of the alienation, instead of setting off the dower by metes and bounds.

The business of life insurance has made rapid advancement in modern times, especially within the past twenty years. New fields of observation have been explored, based upon the combined and actual experience of American life

insurance companies. This has led to the tabulation of the results in what is now known as the "American Table of Mortality," which is now regarded as the orthodox standard throughout the United States and the Canadas. This table is based on the lives of the insurable, or healthy persons, and is known to be now in use generally by modern life insurance companies, for the arithmetical estimate of valuations. We are of the opinion that for these reasons our courts should resort to the "American Table of Mortality" as a basis for the calculation of annuities dependent on the probabilities of human life in this country.¹²² Besides the tables above referred to are those compiled by Professor Bowdich, adopted by the Kentucky Court of Appeals in *Lancaster v. Lancaster*, 78 Ky. 193.

Giauque and McClure's "Dower and Curtesy Tables" are believed to be the most recent, as well as the fullest and most accurate work on the subject, embracing tables of the present value of contingent dower and curtesy estates.¹²³

§ 90. Assignment of dower. This is the act by which the rights of a widow, in her deceased husband's real estate are ascertained and set apart for her benefit.¹²⁴ The writ of dower so called is merely the legal term applied to the procedure which is instituted to secure a due assignment or admeasurement of the dower right.

This subject is one of extended treatment in the early treatises on dower. Fortunately for us, the old English method "of common right and against common right" is rapidly falling into disuse. And the prevailing method of to-day calls for either an action in equity or a settlement between the parties themselves; this last is in the nature of an amicable agreement, and is the mode generally resorted to. Such agreements can be based upon the appraisal and inventory which is always required as an indispensable preliminary to the legal adjustment of the estate.¹²⁵ This inventory is usually filed soon after the husband's death, and hence there is always sufficient data for an intelligent agreement

¹²² Bowdich tables.

¹²³ See 29 Alb. L. J. 439.

¹²⁴ S. Bouv. Inst. 242.

¹²⁵ *Moore v. Holmes*, 32 Com. 553;
Potter v. McAlpine, 3 Dem. 108;
Pursell v. Pursell, 14 N. J. Eq. 514.

or contract. If the widow becomes a party to this arrangement, and the proceeding is conducted with honesty and good faith she will be bound by it. But if any attempts of this character result in failure, if there is no possibility of adjustment by mutual agreement, then the machinery of the courts may be set in motion to compel the assignment of the dower right. In many of the States probate courts possess equity jurisdiction, and there is a growing tendency to recognize their full powers.¹²⁶ As to the form of the action we

¹²⁶ *Note on equity jurisdiction of probate courts.* — Judge Woerner's emphatic endorsement of the proposition we seek to defend will go far toward harmonizing the discordance with which the topic has been heretofore infested. His honor says:

"Courts of probate in America are entitled to the sanction which every court of record holds; they are not to be classed with those tribunals which have no authority beyond special powers for the performance of specific duties, little or in nowise relating to the general administration of justice, whose modes of proceeding are prescribed by the statute, but are of that class of courts whose judgments, like those of the Federal courts, are held good without a recital of the facts upon which they rest. The subject of the validity of judgments and decrees of probate courts is more fully considered hereafter.

"They are in most, if not all, of the States courts of record, having a public seal and a clerk, or authority in the judge to act as clerk, organized process, and executive officers, as well as stated terms and continuing functions. Within the field of their jurisdiction they are as much a branch of the judiciary

of the State as any court of general or plenary powers. As judicial tribunals they have the inherent power of such to punish for contempt to the same extent as common law courts, to compel obedience to their orders and decrees, and their judgments upon matters within their jurisdiction are enforced, usually, by the same means which are at the disposal of common law and chancery courts. Their orders, judgments and decrees are therefore as conclusive upon the parties to the record, until reversed or annulled on appeal, writ of error, or direct proceeding in chancery, for fraud, as decrees in chancery or judgments at law; but if want of jurisdiction appears from the face of the proceedings, they are, like the judgments of any court under like circumstance, merely void."

Many of the American courts of probate were, in early colonial times, modeled after the ecclesiastical courts; hence the necessity of the same rule as applicable to their acts, and the early American cases so holding.

In the progress of time, however, most of these courts were remodeled and vested with greatly increased judicial powers, made

may say it is governed precisely as any other form of action would be. In all the States it must be prosecuted by the real party in interest¹²⁷ and should be begun by the service of a summons and complaint.¹²⁸ As the action affects real property a *lis pendens* should be filed.¹²⁹ Within twenty days of the commencement of the action the defendants must serve their answer or demur to the complaint. If they adopt the first method issue is said to be joined, and the case may be set for trial under the calendar rules. If a demurrer is interposed considerable delay may be occasioned. But after this has been disposed of and the proper pleadings served as ordered, the cause goes on to the trial list. It is quite customary to regard actions of this

courts of record, etc. The reform was initiated and carried out by the legislative branch of government—they only having power to accomplish it—thus compelling the judiciary to follow; and it is but natural, perhaps, that they follow reluctantly. Lawyers and judges were equally imbued with the doctrines of the common law which ignored the ecclesiastical courts as judicial tribunals; and they found it difficult to assign to the American probate courts a different status. And since the enlargement of their powers emanated from as many different sources as there are States, and proceeded in as many different channels, it is not strange that for a long time there was very great divergence in their decisions. It is gratifying to observe, however, that, while unanimity has by no means attained, yet the magnitude of the divergence is gradually diminishing in the proportion in which the principle upon which these courts rest is understood and practically realized.

Thus it is denied by the Federal courts that courts of probate are in

any technical sense inferior courts, and their judgments within the sphere of their jurisdiction are as conclusive as those of the circuit or any other general court, and entitled to the same intendments and presumptions in their favor.—Woerner's American Law of Administration; sec. 145.

Church v. Holcomb, 45 Mich. 29; Vreeland v. Vreeland's Adm. 16 N. J. Eq. 512; Jones v. Lamar, 41 Fed. Rep. 454; Womack v. Womack, 2 Louisiana Annual, 339; Riggs v. Cragg, 89 N. Y. 488; Garton v. Botts, 73 Mo. 274; McGowan v. Lufburrow, 82 Ga. 523; Vaughan v. Suggs, 82 Ala. 357; Finger v. Finger, 64 N. C. 183; Winslow v. Leland, 128 Ill. 304; Search v. Search, 27 N. J. Eq. 137; Mayo v. Tudor, 74 Tex. 471; Lunt v. Aubers, 39 Me. 392; Goff v. Robinson, 60 Vt. 633; Chipman v. Montgomery, 63 N. Y. 236; Moreno v. McCown, 23 Ark. 93.

¹²⁷ Sheridan v. Mayor, 68 N. Y. 30.

¹²⁸ Ward v. Ward, 59 Cal. 139.

¹²⁹ Murry v. Ballou, 1 Johns. Ch. 566; Haverly v. Alcott, 57 Ia. 173.

character as privileged in order to reach a more speedy termination. On the trial of the issues involved the court will award such judgment as is warranted by the law of the case under the evidence educed; and will enter such directions regarding the admeasurement of dower as are just and proper, under the circumstances of the case. "This order, judgment or decree," from the time of its rendition becomes the supreme law of the case, unless duly appealed from, all parties are bound by it, and all rights acquired by virtue of it must be both recognized and respected.

This, in brief, is what in legal parlance is known as the assignment of dower.

The general rule is that, whenever the property in which the widow is entitled to dower is capable of division, dower must be set off by metes and bounds.¹³⁰

The statutes relating to dower have not made a dowress a tenant in common with others in the lands of her deceased husband. The statutes which in some cases give to a widow, in lieu of dower, an estate for her life in one-half of the lands of which her husband died seized in fee, or which gave to her an estate in fee in such lands to an amount not exceeding five thousand dollars, have been held to be modifications of the statutes of descent, and to vest the title to these estates in the widow immediately on the death of her husband.¹³¹ But, as was said in *Sears v. Sears*: "The title thus vested in the widow wholly differs from a mere right of dower, which extends to all lands owned by the husband at any time during the coverture, and confers no seizin until it has been assigned to her." Before the dower is assigned, the widow has no legal estate in the land upon which an execution can be levied.¹³²

At common law a dowress could not enter until her dower had been assigned. After dower had been assigned, and she had entered into possession, she became immediately seized

¹³⁰ 5 Am. & Eng. Encycl. Law, 927; 2 Scribner, Dower, 581, sec. 1; McClanahan v. Porter, 10 Mo. 746; Dunseth v. Bank of United States, 6 Ohio, 76; Code 1886, secs. 1901, 1910.

¹³¹ *Sears v. Sears*, 121 Mass. 267; *Lavery v. Egan*, 143 Mass. 389.

¹³² *Gooch v. Atkins*, 14 Mass. 378; *Hildreth v. Thompson*, 16 Mass. 191; *Croade v. Ingraham*, 13 Pick. 33.

for her life of a freehold estate, with the usual incidents of such an estate, and she could not convey it, and it could be taken on execution by her creditors.¹³³

It is manifest that the reason of the common law rule that a widow cannot convey to another her right to have dower assigned, or enter upon the land before the assignment, as well as of the rule that her right cannot be taken on execution, was not founded upon any policy of the law that dower should be a provision for her support, which should be exempt from liability to be taken by her creditors, because she could not enjoy her dower until it was assigned, and then it at once became alienable by her, and liable to be taken on execution to satisfy judgments obtained against her.

The right to have dower assigned is a valuable right to property, and a right to land, which the dowress can have set off to her whenever she chooses, by legal process, if necessary. By the weight of authority, it is a right which in equity she can assign to another, and the courts of law will recognize the assignment to the extent enabling the assignee to maintain a writ of dower in her name.¹³⁴

The facts that the lands are lands of which her husband died seized, and that she is in occupation, and may continue in occupation, without having her dower assigned, if the heirs or devisees do not object, do not change the essential nature of her right. This provision of the statutes was undoubtedly enacted for her benefit, but we are unable to see any indications that it was enacted for the purpose of exempting her right of dower from being taken to satisfy her debts.

As this right is a valuable interest in property, which is assignable in equity, we are of opinion that it can be reached by creditors.

Suits have been maintained, and the means whereby the

¹³³ *Windham v. Portland*, 4 Mass. 384, 388; *Sheafe v. O'Neil*, 9 Mass. 13.

¹³⁴ *Lamar v. Scott*, 4 Rich. (S. C.), 516; *Robie v. Flanders*, 33 N. H. 524; *Potter v. Everitt*, 7 Ired. Eq.

152; *Tompkins v. Fonda*, 4 Paige, 448; *Strong v. Clem*, 12 Ind. 37; *Payne v. Becker*, 87 N. Y. 153; *Pope v. Mead*, 99 N. Y. 201; *Davison v. Whittlesey*, 1 MacArthur, 163.

land has been applied to the payment of honest debts seem to be within the ordinary powers of a court of equity.¹³⁵

In *Mason v. Mason*, 140 Mass. 63, the conveyance was of an inchoate right of dower by a married woman in the lifetime of her husband. *Maxon v. Gray*, 14 R. I. 641, was decided on the ground that there were no statutes of Rhode Island which gave the court jurisdiction, and that the case was not within the general equity jurisdiction of the court.

§ 91. Outline of the method for the admeasurement of dower.

An action for dower must be commenced by a widow within twenty years after her husband's death unless she is under some legal disability, and, where the property in which dower is claimed is actually occupied, the occupant must be made a party defendant. Assuming that the widow recovers in her action she will be entitled to damages for withholding her dower to the amount of one-third the annual value of the mean profits of the property with interest to be computed from the time of the husband's death. The judgment must further direct that the widow's dower in the property, particularly describing it, shall be admeasured by a referee designated in the judgment, or by three reputable and disinterested freeholders who shall act as commissioners for that purpose. Before entering upon the performance of their duties the referees or commissioners must be sworn to a faithful execution of their duties. They are then, if it is practicable, and, in their opinion, for the best interests of all the parties concerned to admeasure and lay off as speedily as possible, as the dower of the plaintiff,

1, A distinct parcel, constituting the one-third part of the real property of which dower is to be administered, designating the part so laid off by posts, stones, or other permanent monuments.

2, In making the admeasurement, they must take into consideration any permanent improvements, made upon the real property, after the death of the plaintiff's husband, or after the alienation thereof by him; and, if practicable, these im-

¹³⁵ *Payne v. Becker*, 87 N. Y. 153; *Arthur*, 163; *Boltz v. Stolz*, 41 Ohio
Tompkins v. Fonda, 4 Paige, 448; *St.* 540.
Davison v. Whittlesey, 1 Mac-

provements must be awarded within the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit, which she shall derive from so much of those improvements, as is included in the part laid off to her.

3, If it is not practicable, or if, in the opinion of the referee or commissioners, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property, as prescribed in the foregoing subdivision of this section, they must report that fact to the court.

4, They may employ a surveyor, with the necessary assistants, to aid in the admeasurements.

On the coming in of the report of the commissioners final judgment is entered, unless through gross misconduct it is evident that the commissioners have frustrated the right and justice of the case, in which event the court will refuse to confirm the report and make such order in the case as may be just and proper. Should it transpire that it is not practicable, and not for the best interests of all the parties concerned, so to admeasure and lay off a distinct parcel of the property, the final judgment must direct that a sum, fixed by the court, and specified therein, equal to one-third of the rental value of the real property, as ascertained by a reference or otherwise, be paid to the plaintiff, annually or oftener, as directed in the judgment, during her natural life, for her dower in the property; and that the sums, so to be paid, be and remain a charge upon the property during her natural life. The final judgment may also award damages for the withholding of dower.¹³⁶

§ 92. The incident of quarantine. The incident of quarantine remains to be examined. As the husband's death may be commonly supposed to result in more or less confusion of his affairs, and as some time must elapse before the executor or administrator can investigate the condition of the estate, the common law invented a humane and beneficent provi-

¹³⁶ See New York Code Civil Procedure, sec. 1596 et seq.; also 13 Hun, 352; 138 N. Y. 425; 30 Abb. N. C. 242.

sion by which the widow retained possession of her home free of rent, and in some instances, until her dower had been duly assigned. The entire subject is largely regulated by statute. In some States her occupancy is for six months, and she has the same time to determine whether she will accept her jointure in lieu of dower. Courts are disposed to great liberality in this respect. And if, through no fault of the widow, there are unconscionable delays in the assignment of her dower right, her quarantine privileges will not be interfered with.¹³⁷ Both these cases give extended discussions of the subject, and an examination of the statutory law regarding the period for which the widow may retain the home reveals considerable discordance in the legislation. In one group of States the period is limited to forty days; in another group it extends to a full year; while a third group of States allow her to retain possession until her dower right is assigned her. This last is an eminently sensible provision. It is one guarantee of prompt and efficient administration, and acts as a spur upon the too sluggish movements of executors. It may be added that quarantine is a personal right, and is forfeited by the widow in the event of her marriage during the period in which it might otherwise be enforced.¹³⁸

Without wishing to italicize the superiority of any mere statutory wording, it may be said that after a critical review of the entire field, few enactments can be found that embody a wider scope, clearer diction, or more conspicuous brevity, than those of the Massachusetts Revised Statutes now in force. I incorporate these legislative provisions with the text as they are justly regarded as both typical and repository of the variant State legislation on the topic, and in summary will be found to crystallize the legal sense of much previous judicial interpretation. They have been subjected to very rigid scrutiny by the Supreme Court of Judicature, and have the additional advantage of practical test during the many years they have been in operation. It may be admitted that unification of our law is in every way desirable, as its present diversity is a prolific source of litigation, vexation and expense. And in the interests of unification if these statutory

¹³⁷ *Porter v. Robinson*, 3 Marsh.

¹³⁸ *Iaeger v. Bossieux*, 15 Grat. 83.

¹³⁸ Ind. Rev. L. 209; Ill. Rev. L.

237; N. J. Rev. C. 397.

enactments could be generally adopted much irritation and controversy might be avoided. I subjoin the text.

§ 93. **Typical legislation on the subject.** a. Sec. 3. *Rights of wife in real estate of deceased husband.*¹³⁹ A wife shall be entitled to her dower at common law in the lands of her deceased husband. When her husband dies intestate and leaves no issue living, she shall take his real estate in fee to an amount not exceeding five thousand dollars in value, and shall also be entitled during her life to one-half of the other real estate of which he died seized, or, if she files her election therefor in the probate office within six months after the date of letters of administration on his estate, she may have, instead of such life estate, her dower in his real estate other than that taken by her in fee.

If her husband dies intestate and leaves no kindred she shall take the whole of his real estate in fee. A wife shall also be entitled to remain in the house of her husband for forty days after his death without being chargeable with rent.

b. Sec. 4. *Special provision for wife's rights in case of woodland or wild land.*¹⁴⁰ A widow shall have no right of dower in wild lands of which her husband dies seized, except wood lots or other land used with his farm or dwelling house, nor in such lands conveyed by him although afterwards cleared; and if wild land or wood land is taken by a widow under the preceding section for her life estate in half the real estate of which her husband dies seized, she may use, clear, and improve the same.

c. Sec. 5. *Dower in husband's right of redemption.*¹⁴¹ If, upon a mortgage made by a husband, his wife has released her right of dower, or if a husband is seized of land subject to a mortgage which is valid and effectual as against his wife, she shall, nevertheless, be entitled to dower in the mortgaged premises as against every person except the mortgagee and those claiming under him. If the heir or other

¹³⁹ 7 Gray, 533; 2 Allen, 45; 121 Mass. 267.

¹⁴¹ 15 Mass. 278; 3 Pick. 475; 12 Cush. 288; 4 Gray, 46; 7 Id. 148;

¹⁴⁰ 15 Mass. 164; 1 Pick. 21; 7 Id. 100 Mass. 224.

person claiming under the husband redeems the mortgage, the widow shall either repay such part of the money paid by the person so redeeming as shall be equal to the proportion which her interest in the mortgaged premises bears to the whole value thereof, or she shall at her election be entitled to dower according to the value of the estate after deducting the money paid for redemption.

d. Sec. 6. *How dower may be released.*¹⁴² A married woman may bar her right of dower in an estate conveyed by her husband or by operation of law by joining in the deed conveying the same and therein releasing her right to dower, or by releasing the same by a subsequent deed executed either separately or jointly with her husband. Her dower may also be released in the manner provided in chapter one hundred and forty-seven.

e. Sec. 7. *How barred by jointure before marriage.*¹⁴³ A woman may also be barred of her dower in all the lands of her husband by a jointure settled on her with her assent before her marriage, if such jointure consists of a freehold estate in lands for her life at least and is to take effect in possession or profit immediately on the death of her husband, her assent to such jointure being expressed, if she is of full age, by her becoming a party to the conveyance by which it is settled, and, if she is under age, by her joining with her father or guardian in such conveyance.

f. Sec. 8. *How barred by pecuniary provision.*¹⁴⁴ A pecuniary provision made for the benefit of an intended wife and in lieu of dower, shall, if assented to as provided in the preceding section, bar her dower in all the lands of her husband.

g. Sec. 9. *If jointure is made without wife's assent or after marriage she may waive it and claim her dower.* Such a jointure or pecuniary provision made after marriage, or before marriage and without the assent of the intended wife, shall bar her dower, unless within six months after the death of her husband she makes her election to waive such jointure or provision. If the husband dies while absent from his wife,

¹⁴² 7 Mass. 14; 18 Pick. 9; 6 Cush. 196; 4 Gray, 600.

¹⁴³ 7 Mass. 153; 2 Cush. 467; 97 Mass. 195.

¹⁴⁴ 15 Mass. 106; 2 Cush. 467; 5 Allen, 187; 9 Id. 234.

she shall have six months after notice of his death within which to make such election; and she shall in all cases have for that purpose six months after notice of the existence of such jointure or provision.

h. Sec. 10. *Widow's interest in husband's real estate, when her right is not disputed, may be assigned to her by probate court.*¹⁴⁵ When a widow is entitled by the provisions of law, by deed of jointure, or under the will of her husband, to an undivided interest in his real estate, either for life or during widowhood, if her right is not disputed by his heirs or devisees, such interest may be assigned to her, in whatever counties the lands lie, by the probate court for the county in which the estate of her husband is settled. Such assignment may be made upon her petition, or, if she does not petition therefor within one year from the decease of her husband, upon petition by an heir or devisee of her husband, by any person having an estate in the lands subject to such interest, or by the guardian of such heir, devisee, or person.

i. Sec. 11. *Widow's interest in husband's real estate to be set off by metes and bounds, or out of rents.*¹⁴⁶ Upon such petition the court shall issue a warrant to three discreet and disinterested persons, who shall be sworn to perform their duty faithfully and impartially according to their best skill and judgment, and who shall set off the widow's interest by metes and bounds, when it can be so done without damage to the whole estate. But when the estate out of which a widow's interest is to be assigned consists of a mill or other tenement which cannot be divided without damage to the whole, such interest may be assigned out of the rents, issues, or profits thereof, to be had and received by the widow as a tenant in common with the other owners of the estate.

j. Sec. 12. *Provision for case where husband is tenant in common.* When a woman is entitled to an undivided interest in lands owned by her husband as tenant in common, the probate court upon petition by her, or by any person entitled to petition for assignment of her interest in her husband's lands, and upon notice as in case of other partitions, may

¹⁴⁵ 9 Mass. 9; 13 Met. 414; 4 Cush. 257; 112 Mass. 42; 121 Id. 267.

¹⁴⁶ 4 Mass. 533; 15 Id. 164.

empower the commissioners to make partition of the lands so owned in common, and then to assign to the widow her interest in the portion set off to the estate of her husband.

k. Sec. 13. *Widow may claim her interest after occupying in common with heirs.*¹⁴⁷ When a widow is entitled to an interest in lands of which her husband died seized, she may, without having her interest assigned, continue to occupy such lands with the heirs or devisees of the deceased, or to receive her share of the rents, issues, or profits thereof, so long as such heirs or devisees do not object thereto; and whenever the heirs or devisees or any of them deem it proper to hold or occupy their share in severalty, the widow may claim her interest, and shall have the same assigned to her according to law.

l. Sec. 14. *Limitation of time within which widow's interest in husband's real estate may be claimed.* No widow shall be entitled to make claim for an interest in her husband's real estate, or to commence an action or other proceeding for the recovery thereof, unless such claim or action is made or commenced within twenty years after the decease of the husband; except that if at the time of the husband's decease the widow is absent from the commonwealth, under twenty-one years of age, insane, or imprisoned, she may make such claim or commence such action or proceeding at any time within twenty years after such disability ceases.

m. Sec. 15. *If widow is evicted, etc., she may be endowed anew.*¹⁴⁸ If a woman is lawfully evicted of lands assigned to her as dower or settled upon her as jointure, or is deprived of the provision made for her by will or otherwise in lieu of dower, she may be endowed anew in like manner as if such assignment, jointure, or other provision had not been made.

¹⁴⁷ 3 Pick. 475; 5 Id. 146.

¹⁴⁸ 13 Mass. 162; 1 Met. 66.

CHAPTER VII.

JOINTURE.

- SEC. 94. The term defined.
95. Requisites of.
96. Incidents of jointure.
97. Distinction between legal and equitable jointure.
98. No set form of words necessary to create.
99. The settlement must not impair the rights of creditors.
100. Marriage settlements favored in the law.
101. Review of the authorities on ante-nuptial settlements.

§ 94. **The term defined.** Jointure is a sole estate limited to the wife only and made in satisfaction of her whole dower. One mode of barring the claim of a widow to dower is by settling upon her an allowance previous to marriage to be accepted by her in lieu thereof. This is called a jointure.¹

Judge Cooley says jointures are uncommon in the United States, and questions concerning them arise but seldom.²

Although once common in England, it is of little moment since the Dower Act of 3 and 4 Wm. IV (1833), c. 105, placed the subject of the wife's dower under the control of the husband in all cases where special provision is not made in her favor, which is usually done by marriage settlements.³

Jointures, where recognized, are legal or equitable in nature, and may be made before or after marriage. They have been regulated largely by the statute of 27 Hen. VIII (1536), c. 10 — the Statute of Uses.⁴

Judge Shepley, voicing the opinion of the court in *Vance v. Vance*, 21 Me. 364, says, that as early as 1647 Plymouth colony ordained that every married woman "that shall not, be-

¹ Anderson's Law Dict., citing *inter alia* Grogran v. Garrison, 27 Ohio St. 60; *Vance v. Vance*, 21 Me. 364.

² Note 2, Blackstone, 137; and see exhaustive discussion in "Cruise

Digest," 195, 1 Am. Ed., N. Y., 1808.

³ See Settle, 4.

⁴ 2 Bl. Com. 180; see Use, 3, statute, etc.; cited from Anderson's Dict. of Law.

fore marriage, be estated by way of jointure, in some houses, lands, tenements, or other hereditaments, for term of life," shall have her dower. And his honor treats the entire subject of jointure, as an estate of freehold; but it cannot prevent a claim for DOWER, unless made before marriage and with the consent of the intended wife.

§ 95. **Requisites.** In strict legal jointure six things are said to be requisite:

1, The provision for the wife must take effect in possession or profit immediately after her husband's death.

2, It must be for her own life, at least, and not "*pour autre vie*," or for any terms of years, or for any smaller estate. But the widow will be bound by the acceptance of a precarious interest, if she were adult at the time she agreed to the jointure.

3, It must be made to herself and no other in trust for her.

4, It must be made in satisfaction of the whole of her dower, and not a part only.

5, It must be either expressed or averred to be in satisfaction of dower.

6, It must be made before marriage; if made after marriage, the widow may, in general, waive it and claim her dower.*

Of jointures and settlements. Although a highly vaunted institution and one conspicuously favored in the law, marriage too frequently leaves the wife in an utterly dependent condition so far as regards the possession of money, or the absolute control of a separate estate. To alleviate the distress of her condition jointure was devised by the common law, while marriage settlements are a far more modern devise. The first imports a provision made by the husband who devotes certain specific property to the exclusive custody; while the second is a sort of family compact by which the wife's friends and relatives seek, through the medium of a marriage settlement, to secure to her an absolute right in property. Walker says: "The propriety and importance of making such arrangements will be obvious when we come to

* 1 Abb. Law Dict. 656; see Vance Sellick, 8 Conn. 85; McCartie v. v. Vance, 21 Me. 364; Sellick v. Teller, 2 Paige Ch. 511.

speak of the authority which the husband exercises over the whole property, when not thus placed beyond his reach. If it be called generosity in the husband, in anticipation of some possible reverse of fortune, to provide a sure support for his wife in the day of adversity, by placing some portion of his property for her separate use beyond the control of himself or his creditors, it must be considered a sacred duty in the parent to take this precaution. And when we daily see the distress which might thus easily have been prevented, we cannot but wonder that these arrangements are not more frequently made.”⁶

§ 96. **Incidents of jointure.** In common apprehension, dower and jointure convey substantially the same idea — some adequate provision for the widow. But while their general aspects may be somewhat similar, in minutiae and detail they may be found to differ. For instance, jointure may be made up of both personal and real property.⁷ But in the majority of the States, it must consist exclusively of land.⁸ Another incident, and one very peculiar is that it may be made by parol.⁹ It seems singular that rights of this character should be made dependent upon the transitory and illusory evidence of parol testimony. It may not be material to investigate the facts for many years after the settlement by jointure. Suppose that half a century after such a transaction the husband dies intestate leaving an immense property. Fifty years before, the wife had received that which at the time was regarded as a handsome antenuptial allowance. But the evidences of this fact repose upon the frail and perishable tenure of memory. The witnesses are dead, scattered, or have utterly forgotten the circumstances, considerations of great moment impel the widow to strict silence, and as a result a handsome jointure, which was designed to extinguish her dower right, and the use of which has been, perhaps, accumulating for a period of fifty years, is utterly ignored because grounded on parol testimony, and unevi-

⁶ Cited from Walker's Am. Law, 257.

⁸ Vance v. Vance, 22 Me. 364.

⁹ Kline v. Kline, 57 Pa. St. 120;

⁷ Andrews v. Andrews, 8 Conn. 79.

Howton v. Howton, 14 Ind. 505.

denced by any memorial of a permanent character. As a result the wife receives her dower; the policy of the law is frustrated, injustice to other beneficiaries results, and a legal and equitable wrong is consummated because the law allows an important transaction to be consummated in a shiftless manner.

It would seem that the Statute of Frauds would be of distinct application in such a case; but *Howten v. Howten, supra*, effectually negatives this view, and when we recall the chronic tendency of all our courts to ignore the Statute of Frauds wherever there has been a part performance of the agreement, we can readily see that the statute cannot be relied upon as a preventive in cases of parol jointure. Probably nothing but express legislation can reach the subject. And if an enactment were passed directly condemning such transactions, the courts would find that such condemnations operated by way of forfeiture, and the rules of strict construction would be applied in conjunction with the pet equitable theory of part performance. We see no evasion from the embarrassments that environ this subject. We know it is illogical to complain of an existing state of things unless a reform can be suggested that is effective. We confess our inability to even outline the reform, so long as the courts will systematically evade the direct recitals of the Statute of Frauds by applying the equitable rule of part performance, and then construing every case as presenting that identical feature — "Partly performed, and hence not within the inhibitions of the statute." It is well to recall another legal incident of jointure, viz: If made after marriage the dower right may be asserted in the very teeth of it.¹⁰ Only at the husband's death the wife will be compelled to make an election.¹¹ It is no answer to the claim of a widow to a distributive share in the personal estate left by her husband, to show that she made an antenuptial agreement with him, by which she covenanted to accept certain provisions therein undertaken to be made for her by him, in the place of and as a substitute for dower in his estate, and as a bar and estoppel to any and every other claim by her upon his estate.¹²

¹⁰ *Townsend v. Townsend*, 2 Sandf. Ch. 711.

¹¹ *Butts v. Trice*, 69 Ga. 74.

¹² *Sullings v. Richmond*, 5 Allen.

Such a contract with the performance had or secured, constitutes a full bar to a claim for a distributive share of the personal estate, if its language is broad enough to cover it.¹³

Still another incident is this: In the event of eviction by title paramount, she will be allowed to claim a provision of equal value in the other lands of her husband.¹⁴

§ 97. Distinction between legal and equitable jointure.

While I am strongly impressed, and have an abiding presentiment that Judge Cooley's remark regarding the infrequency of this estate should abundantly excuse the scantiest possible treatment, I am moved to notice a distinction that has proved a delusion and a snare to more than one student of this subject. It is singular how the simplest things occasion the gravest dilemmas; and equitable jointure is bottomed on the idea of a specific contract, deliberately entered into on the part of the wife, by which she accepts a definite sum of money or a conveyance of certain lands, or any other valuable consideration as the full equivalent for her ultimate dower rights in her husband's property, if she subsequently so elects. While legal jointure proceeds upon the theory that a satisfactory provision has actually been made — that nothing further is to be performed in the matter. In other words, equitable jointure contemplates something yet to be, the wife having, in all cases, a reserved right of election, while legal jointure regards the matter as definitely settled. The distinction which always had to apologize for its existence has been abolished in New York, and doubtless in some other States.¹⁵

§ 98. No set form of words necessary to create. Law does not insist upon any set form of words to create a jointure, and ordinarily any language sufficiently expressive of the intent may be employed. A form is appended to the case of

¹³ 2 Williams on Executors (4th Amer. ed.), 1278; Peachey on Marriage Settlements, 358, 359; Davila v. Davila, 2 Vern. 724; Gurly v. Gurly, 8 Cl. & Fin. 743; Buckinghamshire v. Drury, 2 Eden, 60; Dyke v. Randall, 2 DeG., Macn. &

Gord. 209; Vincent v. Spooner, *ubi supra*.

¹⁴ Camden v. Jones, 23 N. J. Eq. 171.

¹⁵ McCartee v. Teller, 2 Paige Ch. 511.

Sullings v. Richmond, 87 Mass. 187, that has successfully withstood the assaults of able counsel, and may be regarded as sufficiently expressive of and adaptive to all cases that are likely to occur. In construing such contracts, the courts apply the ordinary rules that obtain in other cases.

§ 99. The settlement must not impair the rights of creditors.

It scarcely needs any citation of authority to uphold the proposition that a settlement upon the wife by way of either legal or equitable jointure must not infringe the rights of existing creditors. The remarks of Mr. Justice Field in *Moore v. Page*, 111 U. S. 117, must be regarded as decisive on this point. His honor says: "It is no longer a disputed question that a husband may settle a portion of his property upon his wife if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit. And his direct conveyance to her, when the fact that it is intended as such settlement is declared in the instrument or otherwise clearly established, will be sustained in equity against the claims of creditors. The technical reasons of the common law growing out of the unity of husband and wife, which preclude a conveyance between them upon a valuable consideration, will not in such a case prevail in equity and defeat his purpose."¹⁶ Such is the purport of our decision in *Jones v. Clifton*, 101 U. S. 228. His right to make the settlement arises from the power which every one possesses over his own property, by which he can make any disposition of it that does not interfere with the existing rights of others. As he may give it or a portion of it to strangers or for objects of charity, without anyone being able to call in question either his power or right, so he may give it to those of his own household, to his wife or children. Indeed, settlements

¹⁶ *Shepard v. Shepard*, 7 Johns. Ch. 57; *Hunt v. Johnson*, 44 N. Y. 27; *Story Eq.*, sec. 1380; *Pom. Eq.*, sec. 1101; *Dale v. Lincoln*, 62 Ill. 22; *Deming v. Williams*, 26 Conn.

226; *Maraman v. Maraman*, 4 Met. (Ky.), 85; *Sims v. Rickets*, 35 Ind. 181; *Story v. Marshall*, 24 Tex. 305; *Thompson v. Mills*, 39 Ind. 532.

for their benefit are looked upon with favor and are upheld by the courts. As we said in *Jones v. Clifton*, 'In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legally or morally, to provide for them, as in the case of a wife or children or parents, the only question that can properly be asked is, does such a disposition of the property deprive others of any existing claims to it. If it does not, no one can complain, if the transfer is made matter of public record and not designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee, whether it be by direct conveyance from the husband, or through the intervention of others.'

Whilst property thus conveyed as a settlement upon the wife may be held as her separate estate, beyond the control of her husband, it is of the utmost importance to prevent others from being misled into giving credit to him upon the property, that it should not be mingled and confounded with that which he retains, or be left under his control or management without evidence or notice by record that it belongs to her. Where it is so mingled or such notice is not given, his conveyance will be open to suspicion that it was in fact designed as a cover to schemes of fraud."

§ 100. Marriage settlements favored in the law. The American rule is favorable to marriage articles when the party marrying on their faith had good reason to rely upon them as such.¹⁷

The consideration of marriage is a good and valuable consideration for such contracts.¹⁸

In England after-acquired property may be settled by the parties.¹⁹ Ante-nuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other, like

¹⁷ Schouler, Dom. Rel., sec. 177.

¹⁸ *Bradish v. Gibbs*, 3 Johns. Ch. 523; 1 L. ed. 704; *Wright v. Wright*, 54 N. Y. 440.

¹⁹ *Smith v. Osborne*, 6 H. L. Cas. 375; *Re Peddler*, L. R. 10 Eq. 585; notes to *Story Eq. Jur.*, secs. 983, 984; *Baning Mar. Set.* 80, 172, 179.

dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises.²⁰

§ 101. Review of the authorities on ante-nuptial settlements.

Thus, it is said by Story, J., in *Magniac v. Thompson*, 32 U. S.; 7 Pet. 393; 8 L. ed. 725: Nothing can be clearer, both upon principle and authority, than that doctrine that, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the seller alone intends the fraud, and the other party has no notice of it, he is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but it is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration, and, so that it is *bona fide* and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors.²¹ This is also the settled doctrine in Alabama.²²

Consequently, if it is made in good faith, and without notice of fraud to the parties who take under it, it is unimpeachable by creditors.²³

In the earlier case of *Stilley v. Folger*, 14 Ohio, 610, the court said: "Ante-nuptial contracts have long been within policy of the law both at Westminster and in the United States. They are in favor of marriage, and tend to promote

²⁰ 2 Kent's Com. 165; *Re Youngs*, 27 Hun, 54, affirmed 92 N. Y. 235.

²¹ To the same effect see *Campion v. Cotton*, 17 Ves. Jr. 264, 272 and notes.

²² *Andrews v. Jones*, 10 Ala. 400, 421.

²³ *Eppe v. Randolph*, 2 Call, 103; *Bunnell v. Witherow*, 29 Ind. 123; *Frank's App.* 59 Pa. 190; *Magniac v. Thompson*, 32 U. S., 7 Pet. 348, 8 L. ed. 709; *Campion v. Cotton*, 17

Ves. Jr. 264; *Ex parte McBurnie*, 1 DeG., M. & G. 441; *Coutts v. Greenhow*, 2 Munf. 363, 4 Hen. & M. 485; *Tunno v. Trezeant*, 2 De-saus Eq. 264; *Jones' App.* 62 Pa. 324; *Bank v. Marchand*, T. U. P. Charl't. 247; *Partridge v. Copp*, 1 Eden. 163, *Ambl.* 596; *Cadogan v. Kennett*, 2 Cowp. 432; *Andrews v. Jones*, 10 Ala. 400; *Haselinton v. Gill*, 3 T. R. 620, note; *Croft v. Arthur*, 3 Deaus. Eq. 223.

domestic happiness by removing one of the causes of family disputes — contentions about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled at this day that almost any *bona fide* and reasonable agreement made before marriage to secure the wife in the enjoyment either of her own separate property or a portion of that of her husband, whether during coverture or after his death, will be carried into execution in a court of chancery."

We may appropriately say that the cases go very far to support the rule as thus stated by Mr. Freeman in his note to the case of *Merritt v. Scott*, 6 Ga. 563; 50 Am. Dec. 372, "The marriage itself is the consideration of the settlement, and it is the highest consideration known to the law." Mr. Bishop employs even stronger language: "To say therefore, that it is to be regarded, where it is the inducement to any contract as a valuable consideration, is to utter truth, yet only a part of the truth. What this utterance lacks is in our books not infrequently expressed by the adjective 'highest,' as marriage is the highest consideration known in law."²⁴ No particular form of words is necessary to constitute a valid ante-nuptial contract. However informal the instrument may be, it will be given effect if the intention of the parties is manifested, and it is such as can, in law or in equity, be executed. "This sort of agreement," says an eminent text writer, "will, of course, vary in its terms according to the inclination of the parties; but without regard to such variations it should be held alike, on the better authorities, to exclude dower, where such is the plain intent of the parties."²⁵

In truth, not only do the authorities affirm that no formality is required, but they go further, and declare that such contracts are to be construed with liberality and favor. They will be upheld if possible, and not overthrown unless the necessity leading to that result is imperious. As Mr. Schouler says: "Equity pays no attention to the externals, but considers only the substantial intention of the parties."²⁶

²⁴ 1 Bishop, Married Women, sec. 775.

²⁵ Id., sec. 423.

²⁶ Schouler, Dom. Rel., sec. 176.

The cases enforce and illustrate this rule in many forms.²⁷

It has even been held that letters between the parties, although informal, will be sufficient evidence of the contract.²⁸

Reason and authority are both in favor of a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property. From the earliest years of the law, the courts of chancery, respecting the iron rules of the common law, have favored contracts of this character, and this rule of equity has been grafted into the body of American jurisprudence.²⁹

Davis, J. states the rule to be that a voluntary post-nuptial settlement will be upheld "if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."³⁰ Mr. Justice Field observes: "A husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes for fraud."³¹

Some of the confusion and uncertainty which has been introduced into this subject in this country may be traced to the celebrated decision of Chancellor Kent in the widely known case of *Reade v. Livingston*, 3 Johns. Ch. (N. Y.), 481; s. c. 8 Am. Dec. 520, in which it was held that a voluntary marriage settlement after marriage, was of itself void as to existing creditors. This case has been declared to be "the grandest monument of legal acumen and wide and varied erudition which New York has ever produced," and while it

²⁷ *Neves v. Scott*, 50 U. S., 9 How. 196 (13 L. ed. 102); *Hooks v. Lee*, 8 Irel. Eq. 157; *Smith v. Moore*, 4 N. J. Eq. 485; *Johnston v. Spicer*, *supra*, and cases cited; *Hafer v. Hafer*, *supra*.

²⁸ *Logan v. Wienholt*, 1 Clark & F. 611; *Hammersley v. DeBiel*, 12 Id. 45; *Kinnard v. Daniel*, 13 B. Mon. 496; *Peck v. Vandmark*, 99 N. Y. 29.

²⁹ *Andrews v. Andrews*, *supra*; *Pierce v. Pierce*, 71 N. Y. 154; *Barth v. Lines*, 7 West. Rep. 217, 118 Ill. 374; *Jacobs v. Jacobs*, *supra*; *Beard v. Beard*, 22 W. Va. 130; *Shuee v. Shuee*, 100 Ind. 477; *Wright v. Jones*, 2 West. Rep. 350, 105 Ind. 17-27.

³⁰ *Kehr v. Smith*, 20 Wall. 35.

³¹ *Moore v. Page*, 111 U. S. 118.

is conceded that the case was repudiated by the courts of the very State which gave it birth (*Seward v. Jackson*, 8 Cow. [N. Y.], 406), it was asserted that "unless indications are wholly delusive the learned chancellor was not more than a century in advance of his age."³²

In *Wentworth v. Wentworth*, 69 Me. 247, the court held an ante-nuptial contract valid, although it made no provision at all for the woman, except that the husband should not intermeddle with her property. The court, in the course of the opinion, said in speaking of the contract: "It was made in consideration of marriage, although it is not so declared in terms."³³ Marriage is the highest consideration known to the law.³⁴ Even if it were otherwise, the reciprocal character of the stipulation might well constitute a sufficient consideration."³⁵

The conclusion of the court in the well considered case of *Forwood v. Forwood*, (Ky.), 5 S. W. Rep. 361, is thus expressed: "There is another class of cases that hold that an ante-nuptial contract is a legal contract, the consideration of which may be: first, that of the intended marriage alone; or second, that of a jointure or settlement upon the intended wife in lieu of her dower, or distributable share in her intended husband's estate; and that either of these considerations, if both parties are *sui juris*, is sufficient to uphold the ante-nuptial agreement on the part of the woman to relinquish her right of dower and distributable share in husband's estate." In a similar case the Supreme Court of Maryland said: "The contract was made in contemplation of marriage, and, as clearly appears, was intended to bar or prevent the acquisition of any right by either in the property of the other, in order that the marriage proposed might take place. The main object in view was the consummation of the marriage and it was to that end that the contract was executed. It seems almost impossible to view the contract as founded on any other consideration although the reciprocal character of

³² See *Davis v. McKinney*, 5 Ala. 719. *Magnaic v. Thompson*, 32 U. S., 7 Pet. 348 (8 L. ed. 709); *Vance v.*

³³ *Nail v. Maurer*, 25 Md. 532. *Vance*, 21 Me. 370.

³⁴ *Ford v. Stuart*, 15 Beav. 499; ³⁵ *Nail v. Maurer*, *supra*.

the stipulation might be held to constitute one sufficient to make the contract binding and effective. But whether the marriage they proposed be expressly mentioned as a consideration or not, we think it must be regarded as such, within the purview and meaning of the contract, and we accordingly hold that the contract cannot be avoided on that ground."³⁶ The court, in deciding the case of *McGee v. McGee*, 9 Ill. 548, thus expresses its views of the law: "The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could with great propriety make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide by the contract. Our opinion is, the fair construction of the ante-nuptial agreement is that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seized."³⁷

It was said in *Johnston v. Spicer*, 9 Cent. Rep. 566; 107 N. Y. 185, that "ante-nuptial contracts, by which it is attempted to control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, like dower, are favored by the courts, and will be enforced in equity according to the intention of the parties, whenever the contingency provided by the contract arises."³⁸

In the case of *Andrews v. Andrews*, 8 Conn. 79, the judge who spoke for the court said: "I see no reason why such an agreement, deliberately made and upon a sufficient consideration, should not be enforced in chancery. Such contracts, especially in late marriages, are not unusual. They are opposed to no rule of law, nor to any principle of sound policy. On the contrary they are, in my judgment, highly

³⁶ *Nail v. Maurer*, 25 Md. 538.

³⁷ This doctrine was reaffirmed in *Barth v. Lines*, 7 West. Rep. 217, 118 Ill. 374, and the cases of *Wentworth v. Wentworth*, *supra*, and

Andrews v. Andrews, 8 Conn. 79, were cited with approval.

³⁸ 2 Kent's Com. 165; *Re Young*, 27 Hun, 54, affirmed, 92 N. Y. 235.

beneficial, and are eminently entitled to the aid of a court of chancery, where such aid is necessary to carry them into effect; and especially is this true where the contract has been executed in good faith by one of the parties."

It was said in the case of *Pierce v. Pierce*, 71 N. Y. 154, that "Ante-nuptial contracts, whereby the future wife releases her claim to the right of dower and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made, and executed without fraud and imposition, they will be enforced by the courts."

CHAPTER VIII.

ESTATES BY CURTESY.

SEC. 102. Origin and history.

Note on civil law.¹

- 103. Definition and nature.
- 104. Requisites of this estate.
- 105. How far recognized in this country.
- 106. When the right becomes initiate.
- 107. Rule as to seizin.
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- 110. What property is subject to.
- 111. Of curtesy in a determinable fee.
- 112. Alienage as affecting the right to curtesy.
- 113. Effects of enabling acts on curtesy.
 - a. Views of Mr. Justice Miller.
- 114. Not favored by our courts.
- 115. How the right may be barred or lost.
- 116. Mode of valuing an inchoate right of curtesy.
- 117. Typical legislation on the subject.

§ 102. **Origin and history.** Tenancy by the curtesy, or *per legem terræ*, though so called as if it was peculiar to England, was known not only in Scotland, but in Ireland, and in Normandy also; and the like custom is to be found among the ancient Almain laws; and yet it does not seem to have been feudal, nor does its original anywhere satisfactorily appear. Some English writers (Mirror, Selden, Cowell), ascribe it to Henry I; but Nat. Bacon calls it a law of

¹ *Note on Civil Law.*—The civil law (Lat. Jus, Civile Romanum), was the Roman law, as comprised in the Code, Pandects, Institutes and Novels of Justinian, and his successors, constituting together what is termed the *Corpus uris Civili*, as distinguished from the canon and common law. (Butler's

Hor. Jurid. 30; Tayl. Civ. Law, 134; 1 Kent's Com. 538-543; see Corpus Juris Civilis.

. The Roman law of an earlier period was introduced into Britain on its subjugation by Agricola, toward the end of the first century, and is supposed to have prevailed there until the abandonment of the

counter-tenure to that of dower, and yet supposes it as ancient as from the time of the Saxons; and that it was therefore rather restored than introduced by Henry I.² But as there are no notices of this curtesy among the laws of the Saxons, or among those we have of Henry I, we may, perhaps, with safety rely on Craig's conjecture that it is derived from the civil law.³

Courtesy, or curtesy, Scotch law. A right which vests in the husband, and is in the nature of a life rent. It is a counterpart of the terce. Curtesy requires, first, That there shall have been a living child born of the marriage, who is heir of the wife, or who, if surviving, would have been entitled to succeed. Second, That the wife shall have succeeded to the subjects in question as heir either of line, or of talzie, or of provision.⁴

§ 103. **Definition and nature.** Curtesy is an estate to which a man is by law entitled, on the death of his wife, in the lands or tenements of which she was seized during the marriage in fee simple or fee tail, provided he had issue by her, born

island by the Romans, at the beginning of the fifth century; after which it was superseded by the laws of the Saxons and other invaders. (See Roman Law.) The civil law, properly so called, was first introduced during the reign of Stephen (about the middle of the twelfth century), and is represented by Blackstone and other standard writers on the law of England, as a foreign and rival system, between which and the native common law a continual struggle was maintained until the reign of Edward I, when the common law obtained a complete and permanent victory; the civil law being thenceforward confined within certain limits, and regarded or tolerated as a merely auxiliary and subordinate system. (1 Bl.Com. 18-25; 4 Id. 421-425; 3 Id. 87.)

It is not surprising that the merits of the civil law and its influence upon the law of England, should have been differently viewed and represented by English civilians; but none appear to have gone the length of Mr. Spence, who, in his treatise on the Equitable Jurisdiction of the Court of Chancery, has undertaken to prove the common law itself to be, in many of its most important and (as generally supposed) characteristic doctrines and proceedings, of decidedly Roman origin. (1 Burrill's Law Dict.)

² Eng. Gov. 105, 147.

³ Craig de Jure Feud. 312; Wright 192, 5: Cited from Jacob's Law Dict.

⁴ 1 Bell's Com. 61; 2 Erst. 9, sec. 53.

alive during the marriage, and capable of inheriting her estate.⁵

It is a species of freehold estate not of inheritance. During coverture it is said to be "inchoate," and if, during this period of coverture, issue has been born alive, it only remains for the wife to die in order that the husband may take an estate for his own life.⁶ It appears that in some of the States, the birth of living issue is not necessary in order to entitle the husband to the right.⁷

An estate by the curtesy, says Cruise, quoting Littleton, vol. 1, sec. 1, of chap. 1, title 5, p. 107, is where a man taketh a wife seized in fee simple or in fee tail general, or seized as heir in special tail, and hath issue by the same wife, male or female, born alive albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England.

And a tenant by the curtesy of England, says Blackstone, book 2, chap. 8, p. 126, is where a man marries a woman seized of an estate of inheritance, that is, of lands and tenements in fee simple, or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall on the death of his wife hold the lands for his life as tenant, by the curtesy of England. There are four requisites, says Blackstone, necessary to make a tenancy by the curtesy: marriage, seizin of the wife, issue, and death of the wife.

§ 104. Requisites of this estate. Bouvier says there are four requisites indispensably necessary to the existence of this estate: 1, Marriage; 2, Seizin of the wife, which must have been seizin in deed, and not merely seizin in law; it seems, however, that the rigid rules of the common law, have been relaxed in this respect, as to what is sometimes called waste or wild lands;⁸ 3, Issue; 4, Death of the wife.

1, The marriage must be a lawful marriage; for a void marriage does not entitle the husband to the curtesy; as if a married man were to marry a second wife, the first being alive, he would not be entitled to the curtesy in such second

⁵ 1 Steph. Com. 246.

⁶ Porch v. Fries, 3 Green. 204.

⁷ Merritt v. Horne, 5 Ohio St. 307; Kline v. Beebe, 6 Conn. 494.

⁸ 1 Pet. 505.

wife's estate. But if the marriage had been merely voidable he would be entitled, because no marriage, merely voidable, can be annulled after the death of the parties.⁹

2, The seizin of the wife must, according to the English law, be a seizin in deed; but this strict rule has been somewhat qualified by circumstances in this country. Where the wife is owner of wild, uncultivated land, not held adversely, she is considered as seized in fact, and the husband is entitled to his curtesy.¹⁰ When the wife's estate is in reversion or remainder, the husband is not, in general, entitled to the curtesy, unless the particular estate is ended during coverture.¹¹ The wife's seizin must have been such as to enable her to inherit.¹²

3, The issue of the marriage, to entitle the husband to the curtesy, must possess the following qualifications: First, Be born alive; Second, In the lifetime of the mother; Third, Be capable of inheriting the estate.

First, The issue must be born alive. As to what will be considered life, see Birth, Death, Life.

Second, The issue must be born in the lifetime of the mother; and if the child be born after the death of the mother, by the performance of the Cæsarian operation, the husband will not be entitled to the curtesy; as there was no issue born at the instant of the wife's death, the estate vests immediately on the wife's death to the child, *in ventre sa mere*, and the estate being once vested, it cannot be taken from him.¹³ It is immaterial whether the issue be born before or after the seizin of the wife.¹⁴

Third, The issue must be capable of inheriting the estate; when, for example, lands are given to a woman and the heirs male of her body, and she has a daughter, this issue will not enable her husband to take his curtesy.¹⁵

Fourth, The death of the wife is requisite to make the estate by the curtesy complete.

⁹ Cruise Dig. tit. 5, c. 1, s. 6.

¹⁰ 5 Cowen. 74.

¹¹ 8 Johns. 262; 8 Cranch. 249; 1 Pet. 503; 1 Munf. 162; 1 Stew. 590.

¹² Co. Litt. 29, b; 8 Co. Rep. 35,

¹³ Perk. s. 457, 464; Co. Litt. 20, a; 3 Dev. R. 270; 1 Sumn. 263; but see 3 Atk. 469; 7 Viner. Ab. 149, pl. 11.

¹⁴ 8 Co. Rep. 35, b.

¹⁵ Co. Litt. 29, a.

§ 105. **How far recognized in this country.** The right is expressly given by statute in Maine, Massachusetts, Rhode Island, Delaware, Minnesota, Kentucky, New York, Vermont and Wisconsin. In Virginia, New Jersey, New Hampshire, Alabama, Missouri, Illinois, Tennessee, Maryland, North Carolina, Mississippi, and Connecticut, it is recognized by the courts as an existing estate. No estate by curtesy exists in Indiana, North and South Dakota, South Carolina, Georgia, Louisiana, California or Nevada. In Iowa it is abolished, but the husband takes the same estate in the property left by the wife that she would have had in his estate by right of dower. In South Carolina he takes his share in fee. In Ohio, Oregon and Pennsylvania curtesy is given, though no issue be born alive; while in Texas all property which a husband and wife bring into the marriage, or acquire the same, becomes the common property of both. By statute in Kansas the husband takes one-half of his wife's separate property absolutely, upon her decease without will; and if without issue, he takes an absolute property in all her estate. In Dakota, Indiana, Michigan and Nevada the estate is abolished and in New York the right is defeated by a conveyance by the wife.

In many of the States curtesy is given by statute, in equitable estates of which the wife is seized. The right extends to equities of redemption, contingent uses, and moneys directed to be laid out in lands for the benefit of the wife.¹⁸

§ 106. **When the right becomes initiate.** The subject of tenancy by curtesy initiate has been involved in considerable mystification, owing to an error that has crept into some of the reports and has found its way into text books. I refer to the supposition that mere marriage initiates the tenancy. This is not so. Marriage is a very necessary step, an indispensable step to the right of curtesy; but the right becomes initiate on the birth of issue.¹⁹ And the issue must be born in the lifetime of the mother. The Cæsarian operation does not affect this rule. Again, curtesy becomes initiate when, after marriage, the wife comes into possession of real property.

¹⁸ See 1 Washburn, Real Prop., 4 ed. 164, 166 (1876).

¹⁹ Wilson v. Arentz, 70 N. C. 670.

The rule is not affected if the seizin of the wife occurs before or after the birth of issue; nor is it affected by the death of the issue before the wife became seized. In other words, the essentials which create a tenancy by curtesy need not be coincident but may occur at any time during the existence of the coverture.

§ 107. **Rule as to seizin.** In adopting, in this country, from the common law, the tenancy by curtesy, the rules which prescribe the character or kind of estate to which it attaches, seem uniformly to have been regarded as also adopted. In the absence of statutory enactments, the common law, of which this estate is the creature, must furnish the rule on this subject. It is accordingly laid down by Kent in his Commentaries, that "if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture."¹⁸

But the principal reason of the rule requiring actual seizin by the wife, in order to create tenancy by curtesy, is said by Blackstone to be "because, in order to entitle the husband to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land whereof the ancestor was not actually seized."¹⁹

Though this principal reason of the rule no longer exists, even in England, yet it is said that the rule itself remains there, unaffected by the failure of its main reason.²⁰ But in this country it has been frequently held otherwise. Where ownership, without seizin, regulates the descent of real estate, and gives the right to dispose thereof, either by deed or will, the rule requiring actual seizin in deed has been held not to apply. In *Lessee of Borland v. Marshall*, 2 Ohio St. Rep. 308, the court, proceeding on the maxim *cessante ratione, cessat ipse lex*, held, that inasmuch as seizin of the ancestor was

¹⁸ 4 Kent's Com. 28; Stoddard v. Gibbs, 1 Sumn. 263; Blood v. Blood, 23 Pick. 80; 7 Mass. R. 253; 5 N. Hamp. R. 469; Mackey v. Proctor, 12 B. M. 433; 1 Barb. Ch. Rep. 598;

Tayloe v. Gould, 10 Barb. Sup. Ct. Rep. 388.

¹⁹ 2 Bl. Com. 128.

²⁰ 2 Wend. Bla. 128, note 32.

never necessary to inheritance by the wife, the husband was entitled to curtesy.

Is a man entitled to curtesy in lands, the title to which descended to his wife during coverture, but which were in the actual possession of an adverse claimant from the time her title accrued until her death? It is very clear that, by the strict rule of the common law, he is not; and for the reason that neither the wife, nor the husband in her right, was at any time during coverture, actually seized of the premises. Four things, as we have stated, are necessary to create an estate by the curtesy, viz: Marriage, seizin of the wife, issue, and death of the wife.²¹ And where the wife's title is derived by inheritance, or any other mode requiring an entry to perfect it, the seizin must be in deed, and not merely in law.²²

* The books generally, and with but few exceptions, give but one reason for the rule making seizin indispensable to curtesy, namely, that as, by the common law, livery of seizin was necessary to perfect the title to such an estate, of an heir or devisee, it followed that unless the wife, or the husband in her right, was actually seized, her issue could never, as her heirs, inherit the lands; for, owing to the want of actual seizin, she never acquired an inheritable estate. But unless she had an estate of inheritance there could be no curtesy, as it was indispensable to the existence of curtesy that the mother be seized of an estate which might descend to her heirs, and "the tenancy by curtesy is an excrescence out of the inheritance."²³

In Ohio, a husband may be tenant in curtesy, though the wife was never seized in deed, either actually or constructively, of the lands, and though the same were adversely held, during coverture, by another person. The question was again examined, and this decision approved, in the case of *Merritt v. Horne*, 5 Ohio St. Rep. 308. In the former of these cases, the subject was very fully considered, and the conclusion arrived at by the court was said not to be "in conflict with the principles of the common law. For, even at common law, a seizin in law is sufficient to give curtesy in all

²¹ Co. Litt. 30, a.

²³ 3 Bac. Abr. 11, (Bouvier's ed).

²² Co. Litt. 29, a; *Jackson v. Johnson*, 5 Cow. 98.

inheritances created without entry.²⁴ It is, therefore, a mere application of a common law principle, to say that a seizin in law is sufficient in Ohio, where in no case is an entry necessary to create an inheritance." The same court holds that curtesy does not vest in the husband until the death of the wife, and then only in such property of which she died seized.²⁵

The right the husband acquires by marriage in the lands of the wife is thus stated in vol. 2, p. 131 of Kent's Commentaries, Lacy edition, 1889: "If the wife, at the time of marriage, be seized of an estate of inheritance in land, the husband, upon the marriage, becomes seized of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life, if he dies before his wife, and in that event she takes the estate again in her own right. If the wife dies before the husband, without leaving issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy and on his death the estate goes to the wife, or her heirs, and in all these cases, the emblements growing upon the land at the termination of the husband's estate go to him or his representatives."

If, during her life, real estate is converted by operation of law into personal estate, the conversion will be treated as her own.²⁶

The rents, issues and profits of the wife's lands accruing during coverture belong absolutely at common law to the husband. How effectually these common law rights of the husband have been changed by the statutes of the different States will appear by reference to these statutes.

A mere naked seizin of the wife as trustee is not sufficient

²⁴ 3 Bac. 12; Jackson v. Johnson, 5 Cowen, 98; Ellsworth v. Cook, 8 Paige, 643.

²⁵ Hershizer v. Florence, 39 Ohio St. 516.

²⁶ Graham v. Dickinson, 3 Barb. Ch. 170; 5 L. ed. 861.

to entitle the husband to curtesy²⁷ nor, if he is seized as trustee of property devised to his wife, can he claim curtesy after divorce.²⁸

If there is an outstanding life estate that the wife may ultimately receive as reversioner or expectant heir, such life estate must terminate before the death of the wife in order to confer a right of curtesy in the husband, otherwise she is without seizin in fact.²⁹

§ 108. Birth of living issue. The issue must be born alive. The husband by the birth of the child becomes tenant by the curtesy initiate, and may do many acts to charge the lands, but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

Live birth may be stated to be "the manifestation of some certain sign or signs of life by the child after it is completely born."³⁰

The term "completely born" implies that the child must be in the world in all its parts, i. e., completely external to the mother. It does not imply, however, either that the *placenta* has been separated or that the cord has been divided.

The law admits no mid-stage between life and death. It recognizes no distinction between intra-uterine and extra-uterine life, or between foetal and non-foetal existence.³¹

Respiration is a true sign of life; but on the other hand it does not follow that because a child does not breath, therefore it is not living.³²

Dr. Trail, in his *Medical Jurisprudence*, p. 47, says: "In Scotland, the viability of a child is determined by its crying; in France by its respiration; but in England any tremulous motion of its muscles, however trifling, has been decided to constitute life."³³

²⁷ *Chew v. Commissioners, etc.*, 5 Rawle, 160.

²⁸ *Schoch's Appeal*, 33 Pa. St. 351.

²⁹ *Todd v. Oviatt*, 58 Conn. 174; *Webster v. Ellsworth*, 147 Mass. 602; *In re Cregier*, 1 Bark. Ch. 598.

³⁰ 3 Tidy, *Legal Medicine*, 154.

³¹ 3 Tidy, *Legal Medicine*, 155.

³² 3 Tidy, *Legal Medicine*, 155; Ewell, *Medical Jurisp.* 111; Taylor *Medical Jurisp.* 665, 666; *Fish v. Palmer*, Ct. Exch. (1806).

³³ See 1 Wharton, *Am. Crim. Law*, sec. 874; Dean, *Medical Jurisp.*; Beck, *Medical Jurisp.* p. 356, 357.

Proof of statements made by the mother many years after the birth that the child was born alive was incompetent.³⁴

The proof in the case did not authorize a finding that the child was born alive.³⁵

By the Scotch law, the child must have been heard to cry, and no slighter evidence of life was allowed. This view of the law did not prevail in England, and in Coke on Littleton the law is stated as follows: "If it be born alive it is sufficient, though it be not heard to cry, for, peradventure, it may be born dumb."³⁶

In 1 Beck's Medical Jurisprudence, p. 416, the idea that a child may be born alive and dumb is refuted.

Where the civil law is in force, the interpretation of the word "life" or "being born alive," is, according to most distinguished lawyers and physicians, "complete and perfect respiration."³⁷

In Germany the doctrine is accepted that respiration and life are reciprocally evidence of one another.³⁸

In England the question has arisen in criminal trials where it was necessary to determine whether the destruction of the child was murder or foeticide. In *Reg. v. Wright*, 9 Car. & P. 754, on the trial of a charge of child murder, it appeared from the evidence of the surgeon that the child had never had an independent circulation. The court held the offense to be murder.³⁹

In a few of the States, we find a direct repudiation of the old common law rule respecting the birth of issue as a prerequisite to the husband's rights to curtesy, and in Alabama, Minnesota, Nebraska, Ohio, Oregon and Pennsylvania, such rights attach to the husband without reference to the question of issue having been born of the marriage; seizin of the wife, the fact of marriage, and the death of the wife, being sufficient to vest an estate by curtesy in the husband.

§ 109. Regarded as a legal estate. The interest of the tenant by the curtesy cannot accurately be characterized as a

³⁴ Gardner v. Klutts, 8 Jones L.

³⁷ 1 Beck. Medical Jurisp. 412.

375.

³⁵ Doe v. Killen, 5 Houst. 16.

³⁸ Wharton & Stille, Medical Jurisp. sec. 128.

³⁶ See 2 Bl. Com. 127.

³⁹ Rex v. Enoch, 5 Car. & P. 539.

mere charge or incumbrance. It is rather a legal estate in land, and may be set up by a stranger to defeat an action by the heir.⁴⁰ And it has been held that the husband is entitled as tenant by the curtesy to have the interest of the money arising from the sale of the estate during life in lieu of the rents and profits of the land.⁴¹ But this rule cannot obtain except in those jurisdictions where the common law incidents of this estate have not been impaired by legislation. In all marriages contracted before the passage of the enabling acts, the husband's right to curtesy is to be determined by the law in force in the particular State where he was married, and by the law in vogue at the date of the marriage. The organic law provides that no *ex post facto* law shall be passed, and if the analogy is not too fanciful, we may assume that the husband is protected by a sort of civil application of that rule. A pleading may be filed *nunc pro tunc*; but a husband's rights in real property are hardly within the operation of such a rule.

§ 110. **What property is subject to.** Every estate of inheritance must be regarded as subject to the right of curtesy. The old common law was explicit upon this point, and to-day wherever the doctrine of curtesy obtains, the rule holds good, and will affect a qualified as well as an absolute fee.⁴² Thus, an estate tail is subjected to the incident of curtesy.⁴³ And equitable estates of inheritance will be catalogued under the same heading.⁴⁴ But there are important considerations attaching to these equitable estates that must be clearly apprehended before the theory of curtesy is applied. Conspicuously among these considerations is that of the intention manifested by the party creating the equitable estate in the wife or for her benefit. If it can be gathered from the recitals of the instrument giving her the estate, that it is for

⁴⁰ Adair v. Lott, 3 Hill, 182.

⁴¹ Dunscomb v. Dunscomb, 1 Johns. Ch. 508.

⁴² Simmons v. Gooding, 5 Ired. Eq. 382; Winkler v. Winkler, 18 W. Va. 455; Matter of Creiger, 1 Barb. Ch. 598.

⁴³ Haynes v. Bourn, 42 Vt. 686.

⁴⁴ Gilmore v. Birch, 7 Oreg. 373; Dugan v. Gittings, 3 Gill. 138; Carter v. Dale, 3 Lea, 710; Dunscomb v. Dunscomb, 1 Johns. Ch. 508; Dubs v. Dubs, 31 Pa. St. 154; Forbes v. Smith, 5 Ired. Eq. 369; Tillinghast v. Coggeshall, 7 R. I. 381.

her sole and separate use, independent of any husband she may have, or if any phraseology is present which evidences an intent to exclude the husband, the right of curtesy will be denied him.⁴⁵ I have an abiding conviction that the old common law theory that excluded the husband from any participation whatever in these equitable estates was both sound in principle, and efficacious in practice. It conclusively appears that from the earliest times, the wife's interest, if in the nature of either a reversion or a remainder, which has not yet "fallen in," but was still dependent upon the happening of some contingency, could not be subject to the right of curtesy unless the contingency which terminated the prior estate happened during coverture. In other words, unless the reversion or remainder is reduced to actual possession and disappears as a reversion, and becomes the wife's absolute property during the continuance of the marital relation, the right of curtesy will not attach.⁴⁶

Ordinarily tenancy by the curtesy can only exist in real property. But when the equity jurisdiction acting in accordance with the principles of equitable conversion regards money as realty, the right of curtesy will be held to attach to the property while in this condition. The principle upon which this view proceeds is—equity will regard as done that which should be done; and if, while in the process of doing, the property assumes the character of money pending its reinvestment in land, the court regards it as already in the condition it is to ultimately assume, and gives the husband curtesy in the money, or rather in the interest which is paid on the money.⁴⁷

§ III. Of curtesy in a determinable fee. This caption suggests matters of considerable refinement, but fortunately of rare occurrence. Mr. Washburn states the situation with all of his usual force and lucidity. If the estate of the wife be an estate of inheritance determined by a limitation which

⁴⁵ Carter v. Dale, *supra*.

⁴⁶ Redees v. Hayden, 43 Miss. 633; Bank v. Davis, 31 Ala. 626.

⁴⁷ Northcut v. Whipp, 12 B. Monr. 65; Evans v. Evans, 9 Pa. 190;

Thornton's Exrs. v. Krepps, 37 Pa. 391; Hatfield v. Sueden, 54 N. Y. 284; Taliaferro v. Burwell, 4 Call. (Va.), 321; Withers v. Jenkins, 14 S. C. 597.

ultimately defeats it, the right of curtesy is gone. But if the limitation over be by way of springing use or executory devise which takes effect at her decease, thereby defeating or determining her estate before its natural expiration, and substituting a new one in its place, the seizin and estate which she had in the fee simple or fee tail will give the husband the right of curtesy.⁴⁸

§ 112. Alienage as affecting the right to curtesy In this country our naturalization laws are exceedingly liberal — in the view of many close students of public affairs they are altogether too liberal, and imperatively call for revision on close insular lines. Without discussing the merits or demerits of these laws, it is sufficient for all practical purposes to observe that alienage has little or no effect upon the husband's right of curtesy. If, in the particular jurisdiction where his tenancy becomes important, his alienage should affect the right, he is at liberty to overcome the obstacle by simply applying for naturalization papers. And, should he fail to observe this simple prerequisite, it is doubtful if his rights to the estate could be in any way questioned except through an action on the part of the attorney-general. The cases are very rare in this country as to the effect of alienage on the right to curtesy. But the liberalizing tendency is sufficiently evinced by such broad and all embracing language as the following: "Aliens may take, hold, transmit and convey real estate, and no title to real estate shall be invalid on account of the alienage of any former owner." Under fair interpretation of this language it would seem idle to prolong the discussion of the subject.⁴⁹

§ 113. Effect of the "Enabling Acts" on curtesy. There is certainly much force in the contention that legislative enactment, now generally prevailing throughout the United States, placing the property of married women under their own control, has reacted upon the husband's rights of curtesy. It is difficult to understand how a person can have the owner-

⁴⁸ 1 Wash. Real Prop. Star Page 135; see *McMasters v. Negley*, 152 Pa. St. 303.

⁴⁹ See *Lumb v. Jenkins*, 100 Mass. 527; *Foss v. Crisp*, 20 Pick. 121; *Mussey v. Pierre*, 25 Me. 559.

ship and control of property in a free and unrestrained manner, and at the same time subject it, perchance against his will, to the wishes of somebody else. It cannot affect the logic of the case if that somebody happens to be called a husband. So long as the law aims to place her in an attitude of independence as regards her own property, it is a strange kind of independence that compels her to recognize any disturbance of her right. The entire topic of curtesy is a survival of medieval abominations, and should be blotted out. It does not repose upon the same equities that accompany dower, and it is refreshing to note, that in Michigan and Mississippi, the courts of last resort have held steadily to this view.⁵⁰

Enabling acts, giving the wife power to possess, enjoy and devise her separate estate as if she were sole, have destroyed the tenancy by the curtesy initiate,⁵¹ but do not affect the right of the husband as tenant by the curtesy where the wife dies without alienating or devising her land.⁵²

In California no estate is allowed the husband as tenant by the curtesy on the death of the wife.⁵³ It is generally held that a valid divorce from the bond of matrimony cuts off the husband's tenancy by the curtesy unless expressly or impliedly preserved by statute.⁵⁴

The husband cannot be a tenant by the curtesy in any real estate conveyed to the wife for her sole and separate use with power of disposal.⁵⁵ It should be remembered, however, that in Illinois the married woman's acts of 1861 did not abolish curtesy, but the act of 1874 directly abrogated this estate in the husband. In Mississippi and Michigan the courts have evidenced a tendency to hold that the married woman's acts have abolished curtesy by implication. There is much judi-

⁵⁰ *Ransom v. Ransom*, 30 Mich. 328; *Stewart v. Ross*, 50 Miss. 776; *Billings v. Baker*, 343; but see contra, *Burke v. Valentine*, 52 Barb. 412.

⁵¹ *Breeding v. Davis*, 77 Va. 639; see *Hitz v. National Metropolitan Bank*, 111 U. S. 722.

⁵² *Breeding v. Davis*, 77 Va. 639;

Burke v. Valentine, 52 Barb. 412; *Wait's Actions and Defenses*, vol. 8, page 307.

⁵³ Cal. Civ. Code, sec. 173.

⁵⁴ *Barrett v. Failing*, 111 U. S. 523; *Wait's Actions and Defenses*, vol. 8, page 307.

⁵⁵ *Monroe v. VanMeter*, 100 Ill. 347; *Pool v. Blakie*, 53 Ill. 495.

cial sympathy with this view, but there is a formidable array of authority to the effect that a statute law cannot be abolished by implication except in cases where such intent is so obvious and palpable as to preclude any attempt to consider the statute as in force.

There is considerable controversy as to the precise effect of the various enabling acts by virtue of which married women have obtained a more satisfactory recognition of their property rights. The better opinion seems to be, that the common law incident of curtesy is not abolished by those acts, but is very liable to be defeated by the wife's arbitrary disposition of the property either during her life by deed, or after her death by will.⁵⁶ There is considerable fluctuation in the decisions.⁵⁷

Three distinct departures from the old law are announced in this new statute in regard to the husband's relation to his wife's property, both real and personal:

1, That her right to it shall be as absolute as if she were unmarried.

2, That it shall not be subject to the disposal of her husband.

3, That it shall not be liable for his debts.

In regard to the first of these, it may be conceded that where, at the time of the enactment of this law, the husband had acquired a vested right in the property, Congress did not mean to destroy it, and that to that extent her right would not be as absolute as if she were unmarried.⁵⁸

a. *Views of Mr. Justice Miller.* Under these statutes or "enabling acts" the right of a married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage, shall be as absolute as if she were unmarried and shall not be subject to the disposal of her husband. It was the purpose of the statute to abolish this tenancy by the curtesy, or any other interest of the husband, in all her property, and to place her in regard to it in the condition of a *feme sole*. And it was this same property

⁵⁶ *Lansing v. Gulick*, 26 How Pr. (N. Y.), 250.

⁵⁷ *Burke v. Valentine*, 52 Barb. 412; *Beamish v. Hoyt*, 2 Robt. 307.

⁵⁸ *Hitz v. Nat. Metropolitan Bank*, 111 U. S. 722.

and not part of it, no separate interest or estate in it, which was exempted from liability for his debts. It would be a queer construction of the statute, looking at its manifest purpose, to hold that it meant, though her property shall never come under his control and he shall acquire no interest in it and it shall never be liable for his debts, the use and possession, the rents and profits of it, may be made liable to his debts as long as he lives.

We are of opinion that the statute intended to exempt all property which came to the wife by any other mode than through the husband, from liability to seizure for his debts, without regard to the nature of the interest which the husband may have in it, or the time when it accrued, and that in regard to such debts, created after the passage of the law, no principle of law or morals is violated by the enactment. On the contrary, if we concede that the husband has acquired a tenancy by the curtesy, in her property, before such enactment, it is eminently wise and just that no other person should afterwards acquire such an interest in it as to disturb the joint possession of it, and turn the family resulting from the marriage out, that it may go to pay his debts.⁵⁹

In the case of *White v. Hildreth*, on the other hand, there came before the Supreme Court of Vermont, for construction, a statute in regard to the debts of the husband very like the Act of Congress affecting the District of Columbia. It enacted that the rents, issues and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate, which belonged to her before marriage, or which she may have acquired by gift, grant, devise or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband * * * provided this act shall not affect any attachment or levy of execution already made.⁶⁰

In the case mentioned, 32 Vt. 265, the husband had built upon and improved the land of the wife, after which she rented it to her son, in whose hands the rent was attached by trustee process for the debt of the husband. But the court

⁵⁹ *Hitz v. Metropolitan Bank*, 111 U. S. 722.

⁶⁰ *Comp. Stat. Vt.*, (1850), p. 403, sec. 15.

said: "The legal title to the land with the supervening improvements and buildings is still in the wife. It accrued during coverture. The rent reserved in the lease to her son, is the rent of the land she owns. The statute expressly exempts such rent from the hands of his creditors. This provision of the statute seems to answer what otherwise must have been a well founded suggestion, viz.: that though this money is payable to the wife of the defendant, still it is not the rent of the freehold which the husband held by virtue of the coverture and the birth of issue capable of inheriting, and is in contemplation of law, entirely the husband's, without invoking the wife as the meritorious cause." Here the court holds distinctly that this statute, which does not profess to abolish the tenancy by the curtesy, is still an answer to an attempt to subject the rents and profits to his debts, because it declares that the property shall be exempt from levy for his debts.

In Oregon, the Constitution of the State declared that: "The property and pecuniary rights of every married woman, at the time of the marriage, or afterward acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband." In the case of *Rugh v. Ottenheimer*, 6 Oreg. 231, it was held that this provision applied to marriages, and existing property rights of the husband acquired before the Constitution was adopted, and that such property could not be subjected to the husband's debt, though he had wrongfully taken the title in his own name.⁶¹

§ 114. Not favored by our courts. If curtesy was to be favored it would seem natural and reasonable, perhaps, having abolished the common law requirement of actual seizin, to do away with constructive seizin also as a requisite to support the estate, but jurists agree that it is not to be favored. Chancellor Kent says the extent of the law of curtesy may be justly complained of. The obvious reason is that it gives to the husband what would otherwise belong to the heir of the wife. It has no moral foundation to rest upon, and hence the spirit and tendency of the times is toward its abolition rather than its extension. The Legislature of Connecti-

⁶¹ *Hitz v. Nat. Metropolitan Bank*, 111 U. S. 722.

cut abolished it in 1887 as to all subsequent marriages and several other States have done the same thing.

§ 115. **How the right may be barred or lost.** Where the husband gives his written assent to the wife's disposition of her property, his rights are forfeited, and the principle of estoppel would be applied, should he afterward attempt to assert his claim.⁶² And quite generally it is held that a divorce obtained by the wife for the marital offenses of the husband works a forfeiture of his right to curtesy.⁶³ But other authorities hold that though the wife's dower be lost by her adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy; nor will any forfeiture of estate by the wife defeat the curtesy.⁶⁴ This last is believed to express more accurately the ruling of the old common law, which has been quite generally repudiated in this country.⁶⁵ And some of the statutes go to the extent of annulling the dower right wherever willful desertion has been conclusively established.⁶⁶ No uniform rule is applied in all of the States, and local statutes must largely control the entire topic.

Upon a decree dissolving a valid marriage, equally as upon a sentence of nullity, all the husband's claim to the lands of his wife ceases; and she is entitled to recover immediate possession of them.⁶⁷

4 Kent Com. 10th ed., p. 34, note a, says: "Whether a divorce *a vinculo* will destroy curtesy depends on circumstances, and there is some variety in the laws of the several states. If the cause for divorce be for causes arising before marriage, the right to curtesy, as well as to other rights growing out of marriage is gone, but if for causes subsequent to marriage, the rule is not absolutely stable and uniform."

2 Scribner on Dower, 2d ed., pp. 542-557, shows that while in England the divorce for adultery was in form only *a mensa*

⁶² Silsby v. Bullock, 10 Allen, 94.

⁶³ Howey v. Goings, 13 Ill. 95; Wheeler v. Hotchkiss, 10 Conn. 225.

⁶⁴ Buckworth v. Thrikell, 3 Bos. & Pull. 652, note; Butler's note 170 to Co. Litt. 241, a; Roper on Hus-

band and Wife, 36, 37; 3 Preston on Abst. of Title, 384, 385; Park on Dower, 172, 186; 4 Kent's Com. 34.

⁶⁵ Teague v. Downs, 69 N. C. 280.

⁶⁶ Bealor v. Hahn, 117 Pa. St. 169.

⁶⁷ 2 Bishop Mar. & Div. 5th ed., 1873, sec. 712, and cases.

et thoro, yet a divorce for that cause enabled the husband to marry again; yet by sec. 13, p. 548, a divorce *a mensa et thoro* for adultery by the wife did not bar dower. And it shows, sec. 13, p. 547, that when divorces were granted by act of Parliament, it was the custom to add a clause expressly barring the dower of the wife.

It was established in New York by the case of *Wait v. Wait*, 4 N. Y. 95, that where a divorce was granted for a cause accruing subsequent to marriage, dower was not affected by the divorce.

§ 116. **Mode of valuing an inchoate right of curtesy.** All attempts in this direction have proved unsatisfactory. Statistical tables seem to be of little use, and mortuary statistics as to the lives of married women are grossly inaccurate and misleading. All the data from which any satisfactory result can be obtained are more or less unreliable. Suppose, however, that we succeed in establishing the life expectancy, what possible data can furnish even speculative ground as to the probability or improbability of the wife's alienation of the estate. It is, indeed, singular that such a question should ever have vexed the courts. If some judgment creditor proposes to sell the husband's inchoate right, it is all but certain that the effects of such a sale can be defeated by the conveyance of the wife.⁶⁸

§ 117. **Typical legislation on the subject.** While it is impracticable to attempt any tabulation of the various statutory regulations regarding the subject of curtesy, a reproduction of the Massachusetts law may serve as fairly illustrative of the legislation on the subject. Especially in view of the fact that this legislation is fairly conservative in its character, and does not typify a sweeping abrogation of common law methods on the one hand, and a slavish adherence to medieval notions on the other. It rather seems to have adopted the happy medium, as will appear from the perusal of the accompanying text: "When a man and his wife are seized in her right, and when a married woman is seized to her sole and separate use, of an estate of inheritance in lands, and

⁶⁸ *Benedict v. Seymour*, 11 How. Pr. 176.

they have had issue born alive which might have inherited such estate, the husband shall on the death of the wife hold the lands for his life as a tenant thereof by the curtesy. If they have had no such issue, he shall hold one-half of such lands for his life. If she dies and leaves no issue living, he shall take her real estate in fee to an amount not exceeding five thousand dollars in value,⁶⁹ and shall also have an estate by the curtesy or other life interest, as before provided, in her own real estate. If she dies intestate and leaves no kindred, he shall take the whole of her real estate in fee."⁷⁰

The real and personal property of a woman shall, upon her marriage, remain her separate property, and a married woman may receive, receipt for, hold, manage, and dispose of property, real and personal in the same manner as if she were sole, except that she shall not, without the written consent of her husband, destroy or impair his tenancy by the curtesy in her real estate, or his tenancy for life in one-half of her real estate, in case the husband and wife have had no issue born alive which might have inherited such estate.⁷¹

When a deed of land is made to a married woman, and she at the same time mortgages such land to the grantor to secure the payment of the whole or a part of the purchase money, or to a third party to obtain the whole or a part of such purchase money, the seizin of such married woman shall not give her husband an estate by the curtesy as against such mortgagee.⁷²

⁶⁹ Statutes of 1884, c. 301; 1885, c. 255; and 1887, c. 290, amending Pub. Stats, c. 124, sec. 1, and c. 147, sec. 6.

amended by Stat. 1885, c. 255, and Stat. 1887, c. 290.

⁷¹ Stat. 1889, c. 204.

⁷² Pub. Stats. c. 124, sec. 2.

⁷⁰ Pub. Stats. c. 124, sec. 1,

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

TITLE I. ESTATES FOR YEARS.

II. ESTATES AT WILL OR AT SUFFERANCE — TENANCIES FROM YEAR TO YEAR.

TITLE I. ESTATES FOR YEARS AND HEREIN.

Art. I. Of their Definition, Nature, and Incidents.

SEC. 118. Preliminary — the conventional relation of landlord and tenant. Note on tenant and terre tenant.

119. What is an estate for years.
120. How created.
121. Tenant for years has no seizin.
122. May commence *in futuro*.
 - a. "*Interesse termini*."
123. Regarded in law as a chattel real.
124. Legal incidents of the estate.

§ 118. Preliminary — the conventional relation of landlord and tenant.—There are three grades of estates that in contemplation of law are inferior to freeholds:

- 1, Estates for years.
- 2, Estates at will, or tenancies from year to year, and
- 3, Estates at sufferance.

Estates falling under the first subdivision are of very extended observance, and are the most important of all forms of estates less than a freehold. The conventional relation of landlord and tenant¹ is always implied when we speak of

¹ *Note on "Tenant," "Terre Tenant."*—Tenant: This term, so common in the law of real property, simply designates one who holds realty by virtue of any species of title, whether for a term of years, for life or any definite period, or in fee simple (*Hosford v. Ballard*, 39 N. Y. 151), and in legal contempla-

tion it may be affirmed that every possessor of landed property is a tenant whether the property is absolutely his own or is leased of another. A mere lodger is not within the term. (*White v. Maynard*, 111 Mass. 252.) In popular apprehension the word "tenant" stands opposed to "landlord," and

estates for years. And the extreme frequency of that relation will somewhat indicate its importance. Every estate of this character must endure for a certain set period, otherwise called a term, which is generally determined, though not always, by the recitals of the instrument creating the estate. The term above referred to may be for a month or three months or any other fractional part of a year; but notwithstanding this the estate is still considered, in legal contemplation, an estate for years.³

A terre tenant is one who is literally in the occupation or possession of the land, as distinguished from the owner out of possession. But in a more technical sense, the person who is seized of the land though not in actual occupancy of it.⁴ According to some recent authorities the term has become obsolete.⁵

In *Hulett v. Mutual L. Ins. Co.*, 114 Pa. St. 146, Clark J., said: "A terre tenant, in a general sense, is one who is seized or actually possessed of lands as the owner thereof. In a *scire facias sur mortgage* or judgment, terre-tenant is, in a mere restricted sense, one other than the debtor, who becomes seized or possessed of the debtor's lands, subject to the lien thereof. Those are only terre-tenants, therefore, in a technical sense, whose title is subsequent to the incumbrance." 'Strictly speaking,' says Chief Justice Gibson, in *Mitchell v. Hamilton*, 8 Pa. St. 491, 'only the debtor's subsequent grantee of the fee simple is a terre-tenant.' So in *Dengler v. Kiehner*, 13 Pa. St. 41; 53 Am. Dec. 441, says the same learned judge: 'Who is a terre-tenant? Not everyone who happens to be in possession of the land; there can be no terre-tenant who is not a purchaser of the estate, mediately or immediately from the debtor, while it is bound by the judgment.' To the same effect is *Fox v. Hempfield R. Co.*, 79 Pa. St. 66, note, and many other cases."⁶

implies that the land, house or other real property is not the tenant's own, but another person's, of whom he holds immediately, and this sense is recognized in jurisprudence as when the law relating to "landlord and tenant" is spoken of.

³ See *Tolle v. Orth*, 75 Ind. 298.

⁴ 4 Watts & S. 256; 1 Eden. 177; Black L. D., title "Terre-Tenant."

⁵ Rapalje & Lawrence L. Dic., title "Terre-Tenant."

⁶ *Cahoon v. Hollenback*, 16 S. & R. (Pa.) 425; 16 Am. Dec. 587.

⁷ American and English Ency. of Law, Vol. 25, page 952.

§ 119. **What is an estate for years.** An estate for years is a contract for the possession of lands or tenements, for some determinate period; and it takes place when a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.⁷

Bouvier says it is an estate which is created by a lease for years which is a contract for the possession and profits of land for a determinate period, with the recompense of rent; and it is deemed an estate for years, though the number of years should exceed the ordinary limits of human life; and it is deemed an estate for years though it be limited to less than a single year. It is denominated a term, because its duration is absolutely defined. An estate for life is higher than an estate for years, though the latter should be for a thousand years.⁸

Burrill defines an estate for years as a species of estate less than freehold, where a man has an interest in lands and tenements, and a possession thereof, by virtue of such interest, for some fixed and determinate period of time; as in the case where lands are let for the term of a certain number of years, agreed upon between the lessor and lessee, and the lessee enters thereon.⁹ Blackstone calls this estate a contract for the possession of lands or tenements for some determinate period.¹⁰ It is frequently called a term (*terminus*), because its duration or continuance is bounded, limited and determined.¹¹

§ 120. **How created.** This estate is never brought into being by a mere operation of law, but invariably results

⁷ 2 Bl. Com. 140.

⁹ 1 Steph. Com. 263, 264.

⁸ Co. Litt., 46, a; 2 Kent, Com. 278; 1 Brown's Civ. Law, 191; 4 Kent, Com. 85; Cruise's Dig., tit. 8; 4 Rawle's R. 126; 8 Serge & Rawle, 459; 13 Id. 60; 10 Vin. Ab. 295, 318 to 325.

¹⁰ 2 Bl. Com. 140. See 2 Crabb's Real Prop. 224, sec. 1267; 1 Hilliard's Real Prop. 198; 4 Kent's Com. 85.

¹¹ 2 Bl. Com. 143; Burrill's Law Dict., Vol. I.

from some contractual relation of the parties, which relation may be implied from circumstances; or expressly found to exist by virtue of some written instrument. And in the vast majority of instances, its method of creation is through the instrumentality of what, in technical language, we term a lease.¹²

While it is true that estates for years are usually created by a lease, such estates may result from a devise;¹³ in cases, for instance, where executors are empowered to pay the testator's debts from the rentals of specific property during a certain period. In such a case the executors might be regarded as holding an estate for years. This view may be tenable as a theory, but as matter of practice it seldom or never occurs. The decedent's debts must be paid with reasonable expedition; and if the personal estate is insufficient for that purpose, resort may be had to the realty.¹⁴ The idea that the estate can be held by the executors for a series of years, until the accumulated rents will discharge the indebtedness, is not sanctioned by any law. Our courts sustain but one attitude toward the property of a decedent, as regards the claims of creditors. It must be subjected in its entirety to the full payment of debts, and this without reference to the impoverishment of the family, or even the fulfillment of contract obligations.¹⁵

Mere occupation of premises without the privity or consent of the owner, or without any recognition of the rights of the landlord, does not create any tenancy.¹⁶

§ 121. Tenant for years has no seizin. The rights which the tenant derives under his lease vest in him the mere right

¹² Little v. Livy, 2 Me. 242; Jackson v. Harsen, 7 Conn. 323; Boone v. Stover, 66 Mo. 430; Berridge v. Glassey, 112 Pa. St. 442.

¹³ *Note on devise.*—In its most extended signification, it is a conveyance either in fee, for life, or for years. In its more technical meaning, it is a lease or conveyance for a term of years. According to Chief Justice Gibson, the term "devise" strictly denotes a post-

humous grant, and no more. (5 Whart. R. 278. See 4 Bing. N. C. 678; 2 Bouv. Inst. n. 1774, *et seq.*

¹⁴ Livingston v. Livingston, 3 Johns. Ch. 148.

¹⁵ Long v. Olmstead, 3 Dem. 581.

¹⁶ Doe d. Rogers v. Pullen, 2 Bing. N. C. 749; Doe d. Bingham v. Cartwright, 3 B & Ald. 326; Benjamin v. Benjamin, 5 N. Y. (1 Seld.) 388; Hall v. Jacob, 7 Bush (Ky.) 595.

of entry on the land, and the further right of occupancy or possession during the stipulated term. In contemplation of law he is never regarded as being seized of the lands, and the seizin of the freehold is always with the lessor. The tenant may be possessed of the term stipulated for in the lease, but never of the land itself.¹⁷

§ 122. **Estate may commence in futuro.** An estate for years is frequently created to commence at some definite time in the future, and until that period of time is reached the interests of the future tenant, so far as regards the premises he is entitled to occupy, is beyond the reach of judgment creditors who cannot acquire a lien upon his rights in the premises until after actual entry.¹⁸

a. "*Interesse termini*" is an interest in a term, a right to the possession of a term at a future time, as distinguished from a term in possession or now actually held.¹⁹ It is an expression used to denote the particular interest of a lessee for a term of years, before actual entry on the land demised.²⁰ The bare lease does not vest any estate in the lessee, but only gives him a right of entry, which is called his interest in the term, or *interesse termini*. When he has actually entered, and not before, the estate is completely vested in him.²¹ An "*interesse termini*" is a right or interest only, and not an estate.²² It is, however, so far in the nature of an estate, that even before entry, the lessee may grant it over to another.²³

The lessee of premises to commence at a future day has only an *interesse termini* between the date of the lease and the commencement of the term.²⁴ An *interesse termini* is a right to the possession of a term at a future time. It is a mere *interest* in contradistinction to a term in possession, and its essential qualities arise from the want of possession.²⁵ A

¹⁷ Vanduyn v. Hepner, 45 Ind. 589.

¹⁸ Wood v. Hovell, 10 N. Y. 488.

¹⁹ Co. Litt. 345.

²⁰ Id. 270, a.

²¹ 2 Bl. Com. 144, 314; 1 Steph. Com. 268, 476.

²² 4 Kent's Com. 97 and note.

²³ 1 Steph. Com. 268; Burton's Real Prop. 18, pl. 61; Shep. Touch. 242; 2 Crabb's Real Prop. 227, sec. 1269. And see, as to the rule in American law, 1 Hilliard's Real Prop. 200; 2 Burrill's Law Dict.

²⁴ Co. Litt. 270.

²⁵ 4 Kent, 97.

release to him before entry is void, and the estate does not vest in him until entry.²⁶ And a judgment against him creates no lien on the premises.²⁷

§ 123. Regarded in law as a chattel real. Estates for years come under the designation of a chattel real as they possess many of the attributes of real estate. As such upon the death of the tenant or lessee, his remaining interest vests in the executor or administrator as an incorporeal hereditament.²⁸

Chattels real, as defined by Lord Coke are such as concern or savor of the realty, such as terms for years of land, estates by a statute-merchant, statute stable or the like. In this country, its application relates only to the first mentioned term.²⁹

Estates for years are universally regarded as chattels real.³⁰

By statute in Georgia it is expressly provided that estates for years shall pass to the heir as realty.³¹

§ 124. Legal Incidents of this Estate. Prominent among the incidents which attach to an estate for years is the right of the tenant to reasonable estovers,³² and a right to remove fixtures annexed by him during the continuance of his term, provided such removal is effected before the termination of his lease.³³

And he may, at any time before the expiration of his term, remove buildings or improvements placed by him upon the demised premises but if he omit to remove them until his right of enjoyment ceases, such will be deemed an abandonment, and they become a part of the real estate.³⁴

The lease usually provides for the payment of rent at certain set intervals. Indeed, the Supreme Court of the United States has said that the legal understanding of an estate for

²⁶ Crane v. O'Connor, 4 Edw. Ch. 409.

²⁷ Id.; Wood v. Hubbell, 10 N. Y. 479. Opinion by Willard, J.

²⁸ Chapman v. Gray, 15 Mass. 439.

²⁹ Rapalje & L. Law Dic.

³⁰ Brewster v. Hill, 1 N. H. 350; Sykes v. Sykes, 49 Miss. 190, Crowe v. Wilson, 65 Md. 490.

³¹ See Georgia Code, secs. 22, 73.

³² Middlebrook v. Corwin, 15 Wend. 170.

³³ Torrey v. Burnett, 38 N. J. 457.

³⁴ Dostal v. McCaddon, 35 Iowa, 318; Heffner v. Lewis, 73 Pa. 8t. 302; Cromie v. Hoover, 40 Ind. 49.

years is that it is a contract for the possession and profits of land for a determinate period with the recompense of rent.³⁵ But the relation of landlord and tenant is not dependent entirely upon the agreement to pay rent.³⁶ These incidents of the lease, however, will be accorded extended treatment in a subsequent article.

In a general sense it may be stated that estates for years closely resemble estates for life in their legal incidents. The tenant in each case may be restrained from committing waste, and an application for injunctive relief will always be sustained whenever waste is being committed. Again, we find in both the right to sublet and the right to reasonable estovers.³⁷ And like any other estate, less than a fee simple, it is liable to be drowned, or merged whenever it passes into the possession of a person holding a superior estate — that is to say wherever a lesser estate is united with a greater in one and the same person the doctrine of merger applies.³⁸ This subject has already been referred to in the previous chapter on dower. In early times entry was effected by the actual physical presence of the tenant upon the land. But this with other senseless common law incidents has passed away, and the due execution and delivery of the contract or lease invests the tenant with due title.

A tenant for years is not entitled to emblements, unless his lease depends upon some uncertain event; in which case he is not presumed to know whether a crop planted will come to maturity before the expiration of his term. He must not sow where he cannot reap.³⁹

His term for years is subject to levy and sale on execution⁴⁰

Other legal incidents of this estate will make their appearance as we proceed with our analysis. In a certain sense

³⁵ *United States v. Gratiot*, 14 Pet. 526; *Brown v. Bragg*, 22 Ind. 122.

³⁶ *McKissack v. Bullington*, 37 Miss. 535.

³⁷ *McNeil v. Kendall*, 128 Mass. 245; *Collins v. Hasbrouck*, 56 N. Y. 157; *Robinson v. Perry*, 21 Ga. 182.

³⁸ *James v. Morey*, 2 Cow. 246; *Liebschutz v. Moore*, 70 Ind. 142; *Clift v. White*, 15 Barb. 70.

³⁹ *Whitmarsh v. Cutting*, 10 Johns. 360.

⁴⁰ *Barr v. Doe*, 6 Blackf. 335; *Williams v. Downing*, 18 Penn. St. 60; *Chapman v. Gray*, 15 Mass. 439; *Adams v. French*, 2 N. H. 387.

many chapters may be said to be devoted to the proper elaboration of the incidents that attach to estates for years. And in this connection it may be well to say, that in the symmetrical development of a subject all unnecessary repetitions should be avoided. There is a mass of cordial assent to this last proposition; we may say that it is an unwieldy mass, but we can never avoid repetition, if, in any sub-section of a topic, we follow out the ramifications of contributory principles that in any way assist to give scope and incident to the subject. As an illustration take the subject of waste. It has affiliations with many topics, it could be made formidable in any discussion of life tenancy — dower, curtesy or estates for years, at will, etc. All the forms of joint tenancy may be affected by it, and equitable estates are peculiarly susceptible to impairment by waste. But if we are to pause whenever we reach these respective topics, and elaborate the doctrine of waste as among the incidents of each, bench, bar, and commentator will all refuse to even notice the undertaking. Obviously the true method is to state the nature, scope, and incidents of waste in a separate chapter. Amplify the various topics that are tributary to the title, and leave the variant phases of application to the judgment and discrimination of the practitioner who must adjust and apply them to each particular case. So, in developing the incidents of estates for years, we shall rely upon the context, each subdivision as contributing its proportionate share to the total information we have to offer.

TITLE I. ESTATES FOR YEARS—(Continued.)

Art. II. Of Leases and the Conventional Relation of Landlord and Tenant.

SEC. 125. Definition, form and nature of a lease.

- a. Definition.
- b. Operative words.
- c. Form of lease.
- d. Parol lease.
- e. Requisites.

126. Distinction between a present lease and an agreement to lease.

127. What may be the subject of a lease.

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§ 125. Definition, form and nature of a lease. a. *Definition.*

An instrument which transfers the use and occupation of land at a fixed compensation to be paid at stated intervals, annual or otherwise is a lease.⁴¹ It does not require a seal.

Any instrument conveying an estate in land, subordinate to that of the grantor, to a grantee, upon a valid consideration, and for a definite term, is a lease and not a license.⁴²

Mr. Taylor, whose right to speak authoritatively is at once

⁴¹ *Gilmore v. Ontario Iron Co.*, 86 N. Y. 455.

⁴² *N. Y., C. & St. L. R. Co. v. Randall*, 102 Ind. 453; *Smith v.*

Simons, 1 Root, 318, 1 Am. Dec. 48; *Knight v. Indiana Coal and Iron Co.*, 47 Ind. 105, 17 Am. Rep. 692; *Moore v. Miller*, 8 Pa. 272.

recognized, says: "The relation of landlord and tenant subsists by virtue of a contract, express or implied, between two or more persons for the possession of lands or tenements, in consideration of a certain rent to be paid therefor. The contract itself is called a lease or devise, and is a species of conveyance for life, for years, or at the will of one of the parties, usually containing a reservation of rent to the lessor. A stated rent, however, is not essential to the contract; because from favor, or for a consideration passing to the lessor at the time of its inception, a lease, beneficial in its nature to the lessee, may be made without a reservation of rent."⁴⁸ Independent of the idea of a contract, a lease also possesses the property of passing an interest, and thence partakes of the nature of an estate, which, when limited to a certain period for the enjoyment of land, becomes a term for years; but, if it depends upon the duration of a life or lives, rises to the dignity of a freehold. (The particular regard which the law continues to show to the tenant of a freehold, and the preference given to him above a tenant for years, depends upon feudal principles which have no application to the condition of society under a republican government. In feudal times this estate was, perhaps, more valuable and permanent than an estate for years, as long terms were then unknown. It may have been more honorable, as a proof of military tenure, which embraced privileges only allowed to tenants of the King who took the oath of fealty — an oath which was never permitted to be taken by any one whose estate was less than for life. But will any one, in our commercial age, assert, that an estate for the life of any mere man is of as much value, intrinsically, or entitled to equal consideration with a term for five hundred or a thousand years ?)"⁴⁹

A lease is a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense), made for life, for years or at will, but always for a less time than the lessor has in the premises; for if it be for the whole interest, it is more properly an assignment than a lease.⁴⁸ A contract in writing, under seal, whereby a person, having a

⁴⁸ Hunt v. Comstock, 15 Wend. R. 667.

⁴⁹ 2 Bl. Com. 317; Shep. Touch, 266; Watkins on Conv. 220.

⁴⁸ Taylor's Land. & Ten. 402.

legal estate in hereditaments, corporeal or incorporeal, conveys a portion of his interest to another, in consideration of a certain annual rent or render, or other recompense.⁴⁶ This last definition is framed in accordance with recent English statutes.⁴⁷

b. *Operative words.* The usual words of operation in a lease, according to Blackstone, are "demise, grant, and to farm let," which are translations of the Latin *dimisi, concessi et ad firmam tradidi*, used in the ancient leases.⁴⁸ Other writers state the operative words to be "demise, lease and to farm let."⁴⁹ But any other words which express an intention to part with the possession, will amount to a lease.⁵⁰ In Pennsylvania, the word "lease," even in a parol lease, implies a covenant for quiet enjoyment.⁵¹ As to the difference between a lease and a contract to work for a share of the crop, see 3 Jones Law R. 63.⁵²

The words "demise, grant, and to farm let," are technical words well understood, and are the most proper that can be used in making a lease; but whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for such a determinate time, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose.⁵³

A lease in writing by deed indented consists of the following parts, namely: 1, The premises; 2, The habendum; 3, The tenendum; 4, The reddendum; 5, The covenants; 6, The conditions; 7, The warranty.⁵⁴

c. *Form of lease.* "No precise form of words is necessary to make a lease. Any written instrument expressing the

⁴⁶ Archb. Land. & Ten. 2.

⁴⁷ See 1 Hilliard's Real Prop. 212.

⁴⁸ 2 Bl. Com. 317, 318.

⁴⁹ Watk. on Conv. 207; Archb. Land. & Ten. 19.

⁵⁰ 1 Steph. Com. 477.

⁵¹ 20 Pa. St. R. 482.

⁵² 2 Burrill's Law Dict.

⁵³ 4 Burr. 2209; 1 Mod. 14; 11 Id. 42; 2 Id. 89; 3 Burr. 1446; Bac. Abr. Leases; 6 Watts, 362; 3 McCord, 211; 3 Fairf. 478; 5 Rand. 571; 1 Root, 318; 1 Bouvier's Law Dict.

⁵⁴ Id.

agreement of the parties, signed by one and accepted and acted upon by the other, will be obligatory upon both."⁵⁵ In the case from which we quote the foregoing, the written instrument which the court there held to be a written lease was in form a receipt, but also contained independent stipulations sufficient, in the opinion of the court, to make it also a contract. A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally for the time limited, or for some specific purpose, or in some specific manner, or the right to occupy and cultivate and to remove the products of cultivation; but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove ores, minerals, mineral coal, etc., or to sink wells for procuring and removing petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease, will not be questioned.⁵⁶ Manifestly, there can be no valid reason why a lease may not confer upon the lessee the right to remove a portion of the soil, or of sand and gravel found upon the surface of the land leased, as well as to remove stone or iron ore or mineral coal, found either upon the surface or beneath it.

In estimating the force and effect of the language which constitutes a lease, the form of words used is of no consequence. It is not even necessary that the term lease should anywhere appear in the instrument. Whatever is equivalent will be equally available if the words assume the form of a license, covenant, or agreement, and the other requisites of a lease are present.⁵⁷

As to the form, leases may be in writing or not in writing. Leases in writing are either by deed or without deed; a deed is a writing sealed and delivered by the parties, so that a lease under seal is a lease by deed. The respective parties, the lessor and lessee, whose deed the lease is, should seal,

⁵⁵ *Alcorn v. Morgan*, 77 Ind. Iron Co. 47 Ind. 105, 17 Am. Rep. 184. 692.

⁵⁶ *Knight v. Indiana Coal and* ⁵⁷ *Moore v. Miller*, 8 Pa. St. 272.

and now in every case, sign it also. The lease must be delivered either by the parties themselves or their attorneys, which delivery is expressed in the attestation "sealed and delivered in the presence of us." Almost any manifestation, however, of a party's intention to deliver, if accompanied by an act importing such intention, will constitute a delivery.⁵⁸

d. *Parol lease.* A parol lease, which does not contravene the statute of frauds, is valid and enforceable even in cases where the term is for one year, but not to commence until some fixed date in the future.⁵⁹ The provisions of the Statute of Frauds have been substantially re-enacted in all the States of the American Union, but variant phraseology is employed from that found in the English statute, and the provisions are by no means exactly similar in any two States. All interests relating to land are universally conceded to be within the terms of the statute, and care must be taken in the creation of a parol lease to comply with the restrictions imposed by the laws of the particular jurisdiction.

A lessee by parol for a longer term than three years is a tenant from year to year in every respect except as to the term.⁶⁰

A tenant in possession under a parol agreement void by the Statute of Frauds,⁶¹ and who has occupied for a year paying the rent monthly, is a tenant from year to year, and is entitled to a month's notice to quit.⁶²

e. *Requisites.* To make such a contract, there must be a lessor able to grant the land; a lessee, capable of accepting the grant, and a subject-matter capable of being granted. This contract resembles several others, namely: a sale, to constitute which there must be a thing sold, a price for which it is sold, and the consent of the parties as to both. So, in a lease there must be a thing leased, the price or rent, and the consent of the parties as to both. Again, a lease resembles the contract of hiring of a thing, *locatio conductio rei*, where there must be a thing to be hired, a price or compensation, called

⁵⁸ 1 Ves. Jr. 206.

⁵⁹ *Young v. Dake*, 5 N. Y. 463.

⁶⁰ *People v. Rickert*, 8 Cow. 226.

⁶¹ See sec. 15 *post.*, and for extended discussion see chap. —

⁶² See *Condert v. Cohn*, 118 N. Y.

the hire, and the agreement and consent of the parties respecting both.⁶³

§ 126. **Distinction between a present lease and an agreement to lease.** Leases are frequently drawn by those who are not familiar with the technical accuracy and precision that should characterize instruments of this nature. As a consequence the courts are frequently called upon to decide as to whether the document in question operates as a present lease or whether it is merely an agreement to make and execute a lease at some future time. In construing such an agreement, the courts are largely governed by the intent of the parties as exhibited in the recitals of the document before it.⁶⁴ The form of the expression "we agree to rent or lease" is far from being decisive upon this question, and does not necessarily import that a lease is intended to be given at a future day. On the contrary those words may take effect as a present devise, and the words "agree to let" have been held to mean exactly the same thing as the word "let," unless there be something in the instrument to show that a present demise could not have been in contemplation of the parties.⁶⁵ The test seems to be that if the agreement leaves nothing incomplete it may operate as a present demise.⁶⁶

When an agreement for a lease contains words of present demise, and there are circumstances from which it may be collected that it was meant that the tenant should have an immediate legal interest in the term, such an agreement will amount to an actual lease; but although words of present demise are used, if it appears on the whole, that no legal interest was intended to pass, and that the agreement was only preparatory to a future lease, to be made, the construction will be governed by the intention of the parties, and the contract will be held to amount to no more than an agreement for a lease.⁶⁷

⁶³ Poth., *Bail à rente*, n. 2; Bouvier's Law Dict.

⁶⁴ *Stanley v. Brunswick Hotel Co.*, 13 Me. 51; *Jackson v. Kisselbrack*, 10 Johns. 336; *Kabley v. Worcester Gas Light Co.*, 102 Mass. 292; Pot-

ter v. Mercer, 53 Cal. 667; *Bacon v. Bowdoin*, 22 Pick. 401.

⁶⁵ *Doe v. Benjamin*, 9 Ad. & El. 644.

⁶⁶ *Doe v. Ries*, 8 Bing. 178.

⁶⁷ 2 T. R. 739; see *Co. Litt.* 45 b; *Bac. Abr. Leases*, K; 15 *Vin. Abr.*

Another test is, has the party entered into peaceable possession with the assent of the landlord. If so, the presumption will be indulged that the parties intended to create a present lease, and were not contemplating a mere agreement to make a lease sometime hereafter.⁶⁸ The question is discussed with some elaboration by the Massachusetts Supreme Court of Judicature, in the case of *McGrath v. City of Boston*, 103 Mass. 369. We may add that whatever presumptions are allowable in such cases are favorable to the present existence of the lease.

§ 127. What may be the subject of a lease. *As to what property may be demised*, it is a general rule, that anything corporeal or incorporeal, lying in livery or in grant, may be the subject of a demise. And, therefore, not only lands, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments, are included in the common law rule.⁶⁹ Goods, and other personal chattels, may also be demised; but although rent cannot be said, technically, to issue out of them, the contract for its payment is valid, and an action for rent in arrear may be maintained upon such leases.⁷⁰

A transfer of all the coal in, on, or under a given described surface, even though taking the form of a lease, and terminable in a fixed number of years, is a sale of the coal, and a grant of it in fee as a severed parcel of the land. The doctrine is, perhaps, most fully developed in *Sanderson v. Scranton*, 105 Pa. 472. It was there said that a mineral lease was often in fact a sale; that it differs from an ordinary lease, in that the latter gives only the temporary use and for a fixed period which is the term, and so implies and leaves in the lessor a reversion, while the former conveys the entire interest in the coal and leaves no reversion; that in such a case there is a severance of the surface from the underlying strata, which creates a divided ownership in the land, the

94, pl. 2; 1 Leon. 129; 1 Burr. 2209; Cro. Eliz. 156; Id. 173; 12 East. 168; 2 Campb. 286; 10 Johns. R. 336; 15 East. 244; 3 Johns. R. 44, 383; 4 Id. 74, 424; 5 T. R. 163; 12 East. 274; Id. 170; 6 Id. 530; 13 Id.

18; 16 Esp. R. 106; 3 Taunt. 65; 5 B. & A. 322; 1 Bouvier's Law Dict.

⁶⁸ Hallett v. Wylie, 3 Johns. 44.

⁶⁹ Shep. Touch. 268; Bac. Abr. Leases (A).

⁷⁰ Taylor's Land. & Ten. 10.

coal belonging in fee to one and the surface to another. The court said frankly that the case was not free from doubt, because the agreement was in form a lease for a fixed period, with a rent reserved and a power of distress. Whatever we may think of the general doctrine, one thing about it is quite obvious — it applies to a case and only to a case, in which, by the terms of the agreement, and in contemplation of the parties, the whole body of the coal, considered as of cubical dimensions, and capable of descriptive separation from the earth above and around it,⁷¹ and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land, and severed as land from the estate of which it forms a part. Every case upholding the doctrine which I have been able to examine has that marked characteristic.⁷² That feature seems to me to be not merely accidental or incidental, but a vital and essential element of the doctrine as it is asserted and applied.

The leasing of a furnished house at a fashionable resort has been said to impose a different rule from that which usually obtains under the conventional relation of landlord and tenant. An English case of some celebrity establishes the doctrine, that the tenant may repudiate the lease on its appearing that the house and furniture was so infested with vermin as to warrant an abandonment. The distinction seems to be well taken, as in such cases there is an implied agreement that the premises are fit for occupancy.⁷³ This case has been frequently assailed by our courts, and it certainly is a hardship, to require a landlord to expel every bedbug before making a lease, or to allow every tenant to avoid his obligations by simply asserting that the premises are unfit for occupancy. Evidence to that effect is naturally

⁷¹ *Massot v. Moses*, 3 S. C. (N. S.) 168, 16 Am. Rep. 697; 8 Morrison, Min. Rep. 607.

⁷² *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. 284; *Scranton v. Phillips*, 94 Pa. 15; *Sanderson v. Scranton*, 105 Pa. 469;

Del., L. & W. R. Co. v. Sanderson, 109 Pa. 588; *Fairchild v. Fairchild* (Pa. Sup.), 9 Atl. Rep. 255; *Mon-tooth v. Gamble*, 123 Pa. 240; *Kingsley v. Hillside Coal and Iron Co.*, 144 Pa. 613; *Lazarus' Estate*, 145 Pa. 1.

⁷³ See *Smith v. Marriable*, 11 M. & W. 5.

confined to a small circle of persons interested, and it would seem the better rule to require the tenant to take the lease as he would take his wife, "*cum onere*." The doctrine of the English case has been severely criticized in a recent case decided by the New York Court of Appeals.⁷⁴

a. *Smith v. Marriable examined.* In *Smith v. Marriable*, 11 Mees. & W. 5, a contrary rule was laid down by Baron Parke. The case arose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week left, paying the rent for that week. In an action brought it was held, in the opinion delivered by Baron Parke, concurred in by Barons Alderson and Gurney, "that if the demised premises are encumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance. It rather rests in an implied condition of law, that he undertakes to let them in a habitable state." Chief Baron Abinger concurred upon the ground that "a man who lets a ready furnished house surely does so under the implied condition or obligation — call it what you will — that the house is in a fit state to be inhabited." The opinion of Baron Parke was rested on the authority of *Edwards v. Etherington*, Ryan & M. 268; 7 Dowl. & R. 117, and *Collin v. Barrow*, 1 Mood. & R. 112, both of which cases, together with *Salisbury v. Marshall*, 4 Car. & P. 65, are expressly overruled by *Hart v. Windsor*, 12 Mees. & W. 68, in which Parke, B. said: "We are under no necessity of deciding in the present case whether that of *Smith v. Marriable*, be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*, 12 Mees. & W. 52, for it was the case of a demise of a ready furnished house for a temporary residence at a watering place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on

⁷⁴ *Franklin v. Brown*, 118 N. Y. 110.

which I rested my judgment." *Smith v. Marriable*, as decided at Hilary Term, 1843, and *Hart v. Windsor*, and *Sutton v. Temple*, at Michaelmas Term of the same year. The rule laid down in *Smith v. Marriable*, by Abinger, C. B., as applicable to furnished houses, has been followed in *Campbell v. Wenlock*, 4 Fost. & F. 716, and *Wilson v. Hatton*, 2 Exch. Div. 336; but the rule as stated by Parke, B. has not been followed in England or this country.

It is well settled both in this country and in England, that one who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation.¹⁶

In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it, for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than where there is a mere lease of real estate. One who lets for a short time a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor* which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house

¹⁶ *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Foster v. Peyser*, 9 Cush. 242, 47 Am. Dec. 43; *Stevens v. Pierce*, 151 Mass. 207; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68.

suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling.⁷⁶ In *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302; *Smith v. Marriable*, and *Wilson v. Hatton*, cited above, are referred to with approval, although held inapplicable to the question then before the court."

A careful examination of *Smith v. Marriable*, 11 Mees. & W. 5; *Sutton v. Temple*, 12 Mees. & W. 52, and *Hart v. Windsor*, Id. 68, will convince one that the same judges who decided in favor of an implied condition were, upon re-examination immediately after very doubtful of the wisdom of that decision. They repudiated the authorities on which originally it was decided.

In *Foster v. Peyser*, 8 Cush. 242; 57 Am. Dec. 43, the defendant asked for an instruction to the jury: "There was an implied warranty in the letting of a house for a private residence, that it is reasonably fit for occupation." And Metcalf, J., in the opinion says: "That court refused to instruct the jury that there is any such implied covenant in such a case. And it is well settled by authority that there is not."

The same principle was applied to the lease of a dwelling house, in *Stevens v. Pierce*, 151 Mass. 207, which is the latest decision in point.

In England the doctrine is now well established, that there is such an implied agreement or warranty.⁷⁸

⁷⁶ *Smith v. Marriable*, 11 Mees. & W. 5; *Wilson v. Hatton*, L. R. 2 Exch. Div. 336; *Manchester Bonded Warehouse Co. v. Carr*, L. R. 5 C. P. Div. 507; *Sutton v. Temple*, and *Hart v. Windsor*, *supra*; *Bird v. Greville*, 1 Cababe & E. 317; *Charsley v. Jones*, 53 J. P., Q. B. Div. 280.

⁷⁷ See *Cleaves v. Willoughby*, 7 Hill, 83.

⁷⁸ *Smith v. Marriable*, 11 Mees. & W. 5; *Williams v. Hatton*, L. R. 2 Exch. Div. 336; *Manchester Bonded Warehouse Co. v. Carr*, L. R. 5 C. P. Div. 507; *Bird v. Greville*, 1 Cababe & E. 317; *MacLean v. Currie*, Id. 361; *Chester v. Powell*, 52 L. T.

b. *Lease of separate floors.* A lease of the first floor of a building includes the outside of the front wall of that part of the building, if there is nothing in the lease to control such construction.⁷⁹ It is clearly settled that the occupant of a building, and not its owner, is liable for injuries arising from a lack of due care in keeping it in a reasonably safe condition. So, too, the lessee of the building is the legal occupant of the outside walls to the exclusion of the landlord.⁸⁰ The words "first floor" as applied to leases are synonymous with the words "first story," and are held to include the walls. So where different rooms in the same building are leased to separate tenants, the situation of the property and the nature of the tenures exclude the idea that each tenant takes an estate in the land. Such estates existing at the same time in different tenants are both inconsistent and impossible.⁸¹ Where a tenement is leased to various parties "piecemeal" fashion, it is entirely competent to provide for the erection of signs on the outside of the walls of the various stories opening on a street or alley, and on general principles the entire subject of signs should be more particularly considered in all leases of this description.⁸² In the *Skinner case, supra*, it was said that permitting a sign to be kept upon the wall for a long time would imply a license of the outer surface.

c. *Demise of lodgings.* One or more rooms in a tenement are frequently leased apart from the others, either with or without furniture. As the contract therefor conveys an interest in lands, the Statute of Fraud applies to it as to other leases and requires it to be in writing in like cases⁸³ or limits the time for which a verbal agreement will be valid.⁸⁴

A mere contract with the keeper of a hotel or boarding

722; *Charsley v. Jones*, 53 J. P., Q. B. Div. 280; see also *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 54; *Edwards v. McLean*, 122 N. Y. 302.

⁷⁹ *Lowell v. Strahan*, 145 Mass. 1.

⁸⁰ *Leonard v. Storrer*, 115 Mass. 86.

⁸¹ *Morton, J., in Shawmut Bank v. Boston*, 118 Mass. 125.

⁸² See *Pevey v. Skinner*, 116 Mass. 129; *Baldwin v. Morgan*, 43 Hun. 355; *Riddle v. Littlefield*, 53 N. H. 503.

⁸³ *Inman v. Stamp*, 1 Stark. 12; *Mechelen v. Wallace*, 2 N. & P. 224, 7 A. & E. 49.

⁸⁴ *Edge & Strafford*, 1 Tyr. 293; 1 C. & J. 391.

house for board and lodging does not, however, give the lodger any interest in the realty, or create any tenancy, even though the prices for each are specified separately.⁸⁶ It is simply an entire contract for board and lodging, and the refusal of the party engaging them to become an inmate of the boarding house merely renders him liable for a breach of contract.⁸⁶

§ 128. **Delivery and acceptance of a lease.** Upon the due acceptance of the lease, by the lessee, the conventional relation landlord and tenant is legally created. All the incidents of that particular relation will then spring into activity, and the rules of law that govern and control the respective rights of the parties may be successfully invoked wherever there is an infraction of a right that those laws recognize. The merest tyro in the law of contracts is familiar with the rule that requires mutual, reciprocal, and concurrent assent to the terms of the agreement. Overtures or offers, not definitely assented to by both parties, cannot be distorted into a contract. This last term implies the meeting of minds on the subject of some particular transaction.⁸⁷ And the active manifestation of this meeting of minds is evidenced by the delivery and acceptance of the lease. Such acts will afford all but conclusive evidence that the intention of the parties has been appropriately expressed in the recitals of the lease so delivered and accepted.⁸⁸ And the courts give great latitude to the presumption of acceptance by the lessee on the theory that it is for his advantage to secure some suitable shelter or habitation. Even habitual drunkards and persons *non compos mentis* are competent to enter into the contractual relation, and accept a lease where it appears that the necessities of their situation reasonably demand it.⁸⁹

§ 129. **Parties to a lease—their mutual obligations.** As a general proposition, it may be stated that any person law-

⁸⁶ *Wilson v. Martin*, 1 Den. 602;
Wright v. Stavert, 2 El. & El. 721;
6 Jur. (N. S.) 867.

⁸⁸ *Wilson v. Martin*, 1 Den. 602.

⁸⁷ *Smith v. Gowdy*, 8 Allen, 566;
Craig v. Harper, 3 Cush. 158.

⁸⁸ *Hedge v. Drew*, 29 Mass. 141;
Spencer v. Carr, 45 N. Y. 406;
Jackson v. Richards, 6 Cow. 617.

⁸⁹ 2 Greenl. Cruise. 398.

fully possessed of lands and tenements, may enter into an agreement for their occupancy or use, provided such agreement is compatible with the terms and limits under which he himself holds the property. But this rule is subject to some qualification, as it is universal law that where one leases a piece of property to which he has no title whatever, if, before the eviction of the tenant or the expiration of the term, the party granting the lease acquires title to the property, the principle of equitable estoppel may be successfully invoked in order to compel his recognition of the tenancy he undertook to create before acquiring title.⁹⁰

An elementary principle in the law of contracts sanctions the assertion that any and all persons not under some legal disability, may be parties to a lease. I am well aware that this language is all embracing; but a patient scrutiny of the authorities would seem to fully warrant it. Even trustees are competent to grant leases,⁹¹ and *a fortiori* an executor and administrator.⁹² This latter case holds *inter alia* that a power in a will, authorizing the executors to sell and lease real estate, is a power coupled with an interest and survives. Chief Justice Marshall who wrote the opinion, cites 2 Johns. Ch. 1; 12 Johns. Rep. 537. He further shows that the right to contract is not conferred by society but is a natural original right brought by each individual into society and that the obligation of contracts is not the result of positive law, but is intrinsic, and conferred by the act of the parties. So a *feme covert*, under modern statutes, may make a valid lease of her lands without obtaining the consent of, or even consulting with, her husband.⁹³ Ordinarily a corporation may become a lessor or lessee, even where its charter is silent on the subject, provided the relation is one necessary for it to sustain in order to carry out the purposes for which it was organized. The text books constantly inform us that if the express recitals of the charter prohibit the body corporate from entering into any contract of lease, such recitals are controlling. This may be true, but the fair implication from

⁹⁰ Jackson v. Murray, 12 Johns. 201.

⁹¹ Greason v. Keteltas, 17 N. Y. 491.

⁹² Bank of Hamilton v. Dudley, 2 Pet. 492.

⁹³ Williams v. Urmston, 25 Ohio St. 296; Elliott v. Gower, 12 R. I. 79.

the language is that we must be vigilant in watching for this prohibitory clause. Now, such a clause, as matter of fact, never did, and in all probability never will, appear in any charter. The constant reiteration of these cautionary phrases is tiresome. Books written by theorists abound in just such expressions. There is a fast distinction between what is theoretically right, and what is practically possible or impossible. The Legislature could create a corporation, and then make it impossible for it to discharge its functions, *but it never will*. And the proposition remains intact and unsullied, that any corporation may execute a lease either as lessor or as lessee. That corporations must observe the general tenure of their charter requirements, and must confine the scope and nature of their operations to such as will conserve the purposes of their existence is never doubted, much less disputed; but that a corporation cannot be a party to a lease, even where its charter expressly prohibits that relation, is a proposition I utterly deny pending the citation of some authority to the contrary. Universally a corporation may be a party to a lease for any purpose not opposed to good morals and public policy.⁹⁴ And generally, it may be said, that a lease may be executed by an agent for the party.⁹⁵ But such agent is, of course, disqualified to act for both parties at the same time. He cannot serve two masters.⁹⁶

In *Davies v. Mayor, etc., of New York*, 83 N. Y. 207, an action against a city for rent, Folger, Ch. J., said: "We have no doubt that a municipal corporation or a *quasi* corporation, such as is a county of this State, has the power to enter into a lease and become a tenant of real estate, when the use thereof is needed to carry out any of its acknowledged powers, and to attain the public purposes for which it was erected."⁹⁷

a. *Rights and duties of the landlord.* The rights of the respective parties to a lease are fixed by a formidable array

⁹⁴ *Stanley v. Brunswick Hotel Co.* 13 Me. 51; *Corrigan v. Trenton Co.* 7 N. J. Eq. 489; *Railroad Co. v. Sly*, 65 Pa. St. 205.

⁹⁵ *Stanley v. Brunswick Hotel Co.* *supra*.

⁹⁶ *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48.

⁹⁷ *Inhabitants, etc., v. Wood*, 13 Mass. 193.

of decisions. Without specifically referring to these decisions, in this immediate connection, it may be said that his first right is to receive the prompt and full payment of the stipulated rent when due. He also has the right to compel the lessee to treat the demised premises in a reasonable manner, to the end that no unnecessary loss or damage may accrue, and at the expiration of the lease he has the right to prompt possession without any hindrance or obstruction from the tenant.

The relation of landlord and tenant is one of reciprocity. The duties of the relation are never entirely on one side, and the rights on the other. But each party is bound to the performance of certain acts for the advantage and benefit of the other. For instance, it is the landlord's first duty to secure to the tenant the quiet enjoyment of the premises demised. Indeed, this is a covenant in every lease; if not expressed the law implies it. But it must not be inferred that this covenant for quiet enjoyment would embrace a wrongful eviction or disturbance by a mere intruder or stranger to the title. In disturbances of this character, the tenant must exert himself, and he is remanded to the ample remedies the law gives him in such cases. It is only against acts emanating directly from the landlord, that the covenant for quiet enjoyment is broken. If he institutes the aggression, and invades the tenant's right, the covenant furnishes the basis for relief. The landlord must also make such repairs as have been agreed upon, but under no circumstance can the landlord be compelled to repair unless there is some agreement expressed or implied to that effect.

We must regard it to be settled that a landlord leasing premises abutting upon a public road or street, which are from their construction or present state dangerous to passers lawfully using the way, is liable to such persons for injuries sustained, and this although the premises are controlled by a tenant at the time of the injury. This liability does not attach, however, if the tenant has stipulated with the landlord to put them in repair. But the landlord who will insist on letting premises with a nuisance is liable. This nuisance must be one which in its very essence and nature was a nuisance at the time of letting and not something that

was capable of being made a nuisance by the tenant. It is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises, at the date of the demise. It follows that a landlord from year to year having the power to give the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises with the nuisance attached.⁹⁸ In *Nelson v. Liverpool Brewing Co.*, 2 P. C. D. 311, it was expressly stated that if the landlord leases premises in a dilapidated condition he is liable; and in *Jackson v. Arlington Mills*, 137 Mass. 277, the liability was brought home to the landlord for the acts of tenants in polluting the waters of a brook for the reason that the demised premises were intended to be used in the manner complained of and that if the landlord did not retain control of the matter, it was because he had, by leasing, authorized the uses and abuses that rendered the water impure and pestilential.⁹⁹

It is a rule of extensive application that the tenant, and not the landlord, is responsible to the owners of adjacent properties, and to the general public, for all injuries occasioned by the improper use or condition of the leased premises.¹⁰⁰

Conversely the landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it, has been leased for a lawful and proper purpose. It would be otherwise, if the nuisance existed at the time of the demise.¹⁰¹

As to the general liability of landlord and tenant for injuries to third persons arising out of the improper condition of the leasehold property, see *Churchill v. Holt*, 127 Mass. 165; *Dewire v. Bailey*, 131 Mass. 169; and as to the liability of the landlord to his tenant for injuries arising from his (the landlord's) negligence and sluggishness in making repairs see *Gill v. Middleton*, 105 Mass. 477.

When property is demised, and at the time of the demise

⁹⁸ *Gandy v. Jubber*, 9 B. & S. 15.

⁹⁹ See *Peoria v. Simpson*, 110 Ill. 294; *Irvine v. Wood*, 51 N. Y. 224; *Durant v. Palmer*, 5 Dutch. 544; *Owings v. Jones*, 9 Md. 108.

¹⁰⁰ *Burt v. Boston*, 122 Mass. 403; *Pretty v. Buckmore*, Law Rep. 8 C. P. 401; *Swords v. Edgar*, 59 N. Y. 28.

¹⁰¹ *Salstonstall v. Banker*, 8 Grey, 196.

is not a nuisance, and becomes so only by the act of the tenant, whereby an injury happens, the owner is absolved from liability. But this rule does not obtain, when the owner leases premises, which are a nuisance or must in the nature of things become so.¹⁰²

Where property was leased in an unsafe condition for the use to which it was to be put, and the owner knew, or by the exercise of reasonable diligence could have known, of its condition, and one who is lawfully upon the premises is injured in consequence of this condition, the owner is liable.¹⁰³

Where a building has been made unsafe by the agency of time it is the duty of the owner to put it in safe condition.¹⁰⁴

The neglect of a person to perform a duty imposed upon him by law for the protection of others renders him liable to them for any damage arising therefrom.¹⁰⁵

A landlord is not liable for the negligence of his tenant, over whose acts he has no control.¹⁰⁶

When there are concealed defects, dangerous in their nature and tendency, and so concealed as to escape all ordinary scrutiny and at the same time are known to the lessor the latter is bound to disclose them, otherwise his liability attaches, when, through his failure to caution the lessee in reference to the danger, the latter sustains injury. The principle applied is that one who delivers an article which he knows to be dangerous to another, ignorant of its nature, is liable for any injury resulting therefrom. This principle is accorded a prominent place in leasehold contracts, and has

¹⁰² Ahern v. Steele, 115 N. Y. 203; Wolf v. Kilpatrick, 101 N. Y. 146.

¹⁰³ Todd v. Flight, 9 C. B. N. S. 377; Nelson v. Liverpool Brew. Co. L. R. 2 C. P. Div. 311; Irving v. Wood, 51 N. Y. 224; 10 Am. Rep. 603; Albert v. State, 66 Md. 325; 59 Am. Rep. 159.

¹⁰⁴ Dalay v. Savage, 4 New Eng. Rep. 863; 145 Mass. 38.

¹⁰⁵ Dunnigan v. Chicago & N. W. R. R. Co. 18 Wis. 28; 86 Am. Dec. 741; McCall v. Chamberlain, 13 Wis. 637.

¹⁰⁶ Lowell v. Spalding, 4 Cush. 277; Bartlett v. Boston Gas Light Co. 117 Mass. 533; 19 Am. Rep. 421; Leonard v. Storer, 115 Mass. 86; 15 Am. Rep. 76; Fish v. Dodge, 4 Denio, 311; 47 Am. Dec. 254; Gwinnell v. Eamer, 32 L. T. N. S. 835; Pretty v. Bickmore, L. R. 8 C. P. 401; 28 L. T. N. S. 707; Clancy v. Byrne, 56 N. Y. 129; 15 Am. Rep. 391; Harris v. Cohen, 50 Mich. 324; Mellen v. Morrill, 126 Mass. 545. 30 Am. Rep. 695.

been held sufficiently active to impose full liability upon one who leases premises infected with the smallpox, and neglects to inform the lessee of the fact; the law will not tolerate concealments of this description.¹⁰⁷ Thus in *Reichenbacher v. Pahmeyer*, 8 Bradw. 217, the defect alleged was in the manner of hanging a chandelier, its dangerous condition was well known to the lessor, but he neglected to inform the lessee of the defect, in the nature of the case the danger was not apparent, and the lessor was ruled to pay full damages to the servant of the lessee, who was injured by its fall.¹⁰⁸

A landlord who lets rooms in a building to different tenants, with a right of way in common over the staircase, is bound to use reasonable care to keep such a staircase in repair; if he fails to do so he is liable to a tenant injured thereby while in exercise of reasonable care.¹⁰⁹

While previous knowledge, by a party injured, of a dangerous situation or impending danger, from which a person of ordinary intelligence might reasonably apprehend injury, generally imposes upon him greater care and caution in approaching it, the degree of care required is a question of fact for the jury.¹¹⁰

The law holds a landlord to stricter accountability if he holds out inducements or makes promises to repair, upon which a person injured has relied.¹¹¹

If a lessor, upon taking possession of the leased premises, during the term of the lessee, finds thereon a stock of goods left there by the tenant who has occupied under an arrangement with the lessee, and has abandoned the premises, and the goods are subject to an unpaid mortgage, and the mortgagee declines to take possession of the goods or promise to pay the lessor for storing them, the latter cannot maintain a

¹⁰⁷ *Minor v. Sharon*, 112 Mass. 477; *Bowe v. Hunking*, 135 Mass. 380.

¹⁰⁸ *Scott v. Simons*, 54 N. H. 426; *Godley v. Haggerty*, 20 Pa. St. 387.

¹⁰⁹ *Looney v. McLean*, 129 Mass. 33; *Donodue v. Kendall*, 18 Jones & S. 389; *Neyer v. Miller*, 19 Jones & S. 516; *Lindsey v. Leighton*, 150 Mass. 285.

¹¹⁰ *Dowd v. Fitzpatrick*, 18 N. Y.

Week. Dig. 343; *Pomfrey v. Saratoga Springs*, 7 Cent. Rep. 44; 104 N. Y. 459, 469; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 371; *Looney v. McLean*, *supra*; *Parsons v. New York Cent. & H. R. R. Co.*, 3 L. R. A. 683; 113 N. Y. 364.

¹¹¹ *Laning v. New York Cent. R. Co.* 49 N. Y. 536; *Palmer v. Dear- ing*, 93 N. Y. 7.

bill in equity against the tenant and the mortgagee to recover for the use and occupation of the premises, and for storing the goods.¹¹²

In Georgia, a landlord is generally bound to keep the premises in repair, and may be held liable to third persons for an injury sustained through a defect in repair; but not for injury occasioned by the tenant's negligence or wrongful use of the leased premises.¹¹³ This rule does not extend to patent defects.¹¹⁴

Where a landlord retains possession of a part of a building, he is bound to keep the part retained by him in proper care and condition so that the tenant will not, through the landlord's fault or negligence, be damaged or injured in either his person or his goods.¹¹⁵ Neither of these cases is in harmony with well considered cases in other jurisdictions and the principle announced has been directly repudiated in *Kreuger v. Ferrant*, 29 Minn. 385; *Purcell v. English*, 86 Ind. 34, and in *Cole v. McKey*, 66 Wis. 500.

b. *Rights and duties of the tenant.* Conspicuous among the rights of the tenant is his privilege of enjoying the premises leased for the term mentioned in the lease, and to use them for the purpose agreed upon. He may, unless restrained by the covenants in the lease, either assign it, or underlet the premises. (1 Cruise Dig. 174.) By an assignment of the lease is meant the transfer of all the tenant's interest in the estate to another person; on the contrary, an underletting is but a partial transfer of the property leased, the lessee retaining a reversion to himself. His duties are well understood and seldom occasion controversy.

First, he is bound to fulfill all express covenants he has entered into in relation to the premises leased; and, secondly, he is required to fulfill all implied covenants, which the conventional relation of tenant imposes upon him toward the lessor. For example, he is bound to put the premises to no other use than that for which it was hired; when a farm is

¹¹² *Field v. Roosa*, 159 Mass. 128.

¹¹³ *White v. Montgomery*, 58 Ga. 204.

¹¹⁴ *Driver v. Maxwell*, 56 Ga. 11; Martindale on Conveyancing, 306.

¹¹⁵ *Wood, L. & T.*, sec. 383; *Looney v. McLean*, 129 Mass. 33; *Toole v. Backett*, 67 Me. 544.

let to him for common farming purposes, he cannot open a mine and dig ore which may happen to be in the ground; but if the mine has been opened, it is presumed both parties intended it should be used, unless the lessee was expressly restrained.¹¹⁶

He must use the premises demised in a tenant like and proper manner and exercise proper care and diligence in protecting them from decay and ruin. On the termination of the lease he must restore them to the landlord, in the same condition in which he received them, less the ordinary wear and damage incident to the use for which they were demised. Unless the landlord has accepted an assignment of the tenant's lease and treated the assignee as the successor to all the rights of the original tenant, the lessee will remain chargeable as he was originally with all the burden imposed by the lease. The right to sub-let is frequently denied by some recital in the lease.

Where, however, that instrument is silent on the subject, the right to sublet always exists. But it by no means follows that the landlord forfeits his remedy against the original tenant. It is unquestionably his privilege to select whom he pleases for a tenant, and he is never required to have a person thrust upon him. He may be entirely willing to lease his property to some person of his own choosing, but the sub-tenant selected by his lessee may be a very undesirable party. Hence, the rule is universal that the original tenant is always liable for the entire rent, in the absence of any evidentiary fact on the part of the landlord indicating an intent to recognize the sub-tenant as a substitute.

The lessee is never liable for taxes, insurance or interest on incumbrances unless such liability forms the subject of express stipulation. These are matters entirely within the scope of the landlord's obligations.

Lessees are quite generally exempt by statutory enactment in case the premises are rendered untenable by fire or flood, unless some written recital of the lease itself makes distinct provision for such payment on the happening of such casualty.¹¹⁷

¹¹⁶ 1 Cruise Dig. 132.

¹¹⁷ *Graves v. Berdan*, 26 N.Y. 498.

The right of a tenant on upper floors to light and air from a well or open space which is not accessible to the street, cannot be obstructed where it is necessary to the enjoyment of the demised premises. A landlord is liable to a tenant of upper floors for wrongful obstruction of light and air from a well or open space in a building by a chimney constructed by another tenant under the landlord's express authority to erect such chimney for the use of boilers in the basement.¹¹⁸

It is said in Wood's Landlord and Tenant (sec. 179), that if the tenant "incloses land, whether adjacent to, or in the vicinity of the demised premises and whether the land be part of the waste or of the highway or belongs to the landlord or some third person, the presumption at the end of the term is that the inclosure is part of the holding and was made for the benefit of the landlord."

This rule was applied in the case of *Dempsey v. Kipp*, 61 N. Y. 470, to a private way procured by one Leddick, a tenant, for the benefit of a farm occupied by him as such tenant. It was said by Dwight, Commissioner: "As soon as Leddick acquired the right, it inured to the landlord's benefit. It is settled law, that all that the tenant thus acquires from third persons appertains to the landlord. The rule is applied even to encroachments made by him upon the lands of others; *a fortiori* would it be applicable where the acquisition is made by consent or through contract with the owner of adjoining lands."

After referring to some English cases on the subject, he continues: "These cases establish the doctrine that a tenant, even from year to year, has a capacity to acquire a permanent interest in adjacent lands belonging to third persons for the use of the leased property, which shall inure to his own benefit while the tenancy continues and on its expiration shall appertain to his landlord. There appears to be no difference in principle whether the acquisition is made by prescription or by contract. The tenant's intent is the main subject of inquiry. In the case at bar the intent of both parties, as has already been shown, is plain."

A tenant for years does not acquire the same benefit from the premises that a tenant for life enjoys. But, on the other

¹¹⁸ Case v. Minot, L. R. A. 22, p. 536.

hand, his duties are of a less active character.¹¹⁹ And it is usual for the lessor to stipulate in some paragraph of the lease that any material alterations cannot be made by the tenant without his consent.¹²⁰ And waste or any unconscionable disregard of the lessor's rights will be promptly restrained by injunction or some other preventive measure.¹²¹

But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee."¹²² This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates.¹²³ It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible.¹²⁴

c. *Cannot dispute the title of his landlord.* Tenants cannot, while retaining possession, deny the title of their landlord, or set up against him a title acquired during the tenancy. Having entered upon the enjoyment of the premises by virtue and force of the landlord's ownership, they will not be heard to deny his claim, except in certain instances.¹²⁵

This rule has peculiar force where the lessor was in pos-

¹¹⁹ Long v. Fitzsimmons, 1 W. & S. 530.

¹²⁰ Douglas v. Wiggins, 1 Johns. Ch. 435.

¹²¹ Bellows v. McGinnis, 17 Ind. 64.

¹²² Com. Land & T. 188.

¹²³ Holford v. Dunnett, 7 M. & W. 352.

¹²⁴ Horsefall v. Mather, Holt, 7; Brown v. Crump, 1 Marsh. 569.

¹²⁵ Willison v. Watkins, 3 Pet. 43 (7: 596); Peyton v. Stith, 5 Pet.

485 (8: 200); Hughes v. Clarksville, 6 Pet. 369 (8: 430); Woodward v. Brown, 13 Pet. 1 (10: 31); Walden v. Bodley, 14 Pet. 156 (10: 398); Lucas v. Brooks, 18 Wall. 436 (21: 779); Lewis v. Hawkins, 23 Wall. 119 (23: 113); Stott v. Rutherford, 92 U. S. 107 (23: 486); Williams v. Morris, 95 U. S. 444 (24: 360); Rector v. Gibbon, 111 U. S. 276 (28: 427).

session and transferred that possession to the lessee upon his faith in the validity of the lease.¹²⁶

Hence any evidence tending to show the relation of landlord and tenant would be pertinent in an action where the paramount rights of the landlord were denied.¹²⁷

The relation of landlord and tenant, so long as it exists, estops the tenant and any one succeeding to his rights from denying the title of the landlord.¹²⁸

But a tenant sued for rent may defend upon the ground that the title of the landlord has expired by limitation, voluntary conveyance, or by operation of law.¹²⁹

This threadbare rule precluding a tenant from denying his landlord's title is paraded with limitless activity in works relating to this subject, but reduced to its ultimate essence, and bereft of its surplusage, it amounts to just this, "don't deny your landlord's title unless you can do it successfully."

There is no prohibition for the grantee in fee to deny the title of the grantor in case he is holding adversely to his grantor. There can be no application of the principle of estoppel where the occupant is under no obligation, express or implied, that he will ever redeliver the possession of the premises. The grantee in fee is under no such covenant. His possession is in a sense contingent upon his future transference of the possession. His holding is in perpetuity to himself and his grantee's heirs, assigns, etc., and he violates no faith and indulges in no duplicity when he treats him as an utter stranger to the property both as respects the right of reversion and the muniments of title.¹³⁰

After judgment by default in a suit upon a lease, the tenant may, on an inquiry of damages, to diminish them, show that the title of the lessor was divested or defeated.¹³¹ And

¹²⁶ *Stott v. Rutherford*, *supra*.

¹²⁷ *Campau v. Lafferty*, 43 Mich. 429; *Morrison v. Bassett*, 26 Minn. 235; *Pate v. Turner*, 94 N. C. 47; *Loring v. Harmon*, 84 Mo. 13; *Mauldin v. Cox*, 67 Cal. 387; *Caldwell v. Smith*, 77 Ala. 157; *Bryan v. Winburn*, 43 Ark. 28; *Helena v. Turner*, 36 Ark. 577; *Providence*

County Sav. Bank v. Phalen, 12 R. I. 495; *Jones v. Dove*, 7 Or. 467.

¹²⁸ *Jackson v. Davis*, 5 Cow. 123; *Van Rensselaer v. Van Wie*, 23 Wend. 531.

¹²⁹ *Ferris v. Houston*, 74 Ala. 162.

¹³⁰ *Osterhout v. Shoemaker*, 3 Hill. 513.

¹³¹ *Barclay v. Picker*, 38 Mo. 143.

in an action to recover a portion of a mining claim, and damages for wrongfully removing the gold therefrom, evidence is admissible on the part of the defendant, by way of lessening the amount recoverable, of the expense of digging the gold-bearing earth from the claim.¹³²

A tenant cannot justify his attornment to a third party by merely showing that such party has recovered a judgment against him for the possession of the premises. He must show that his landlord was notified of the pendency of the action and had an opportunity to defend; otherwise the landlord is neither bound nor estopped by the judgment.¹³³ A tenant in possession under one title can make no valid attornment to any one not in privity with that title; and one in possession as tenant in common, in privity and full recognition of the title of the undivided interest not owned by himself, as belonging to some one else, is bound to account to the latter; and a promise to pay rent to another, made by such tenant in possession on the assumption that such promise had such outstanding interest, cannot be enforced without proof that he held such title; for if he had no title, the attornment would be void and the promise without consideration.¹³⁴

But this rule as to the estoppel of a tenant applies only where the conventional relation of landlord and tenant exists by contract, and some rent or return is in fact reserved, and not where it arises by mere operation of law, as in case of an assessment lease; and if one holding such a lease conveys the land in fee, his grantee, by occupying for the statutory time after the expiration of his lease, will acquire a title by adverse possession, which he may set up against the owner.¹³⁵

Where a tenant would be estopped from disputing the title of his landlord, says Mr. Chitty, he is also estopped from disputing that of his assignee.¹³⁶ This rule which denies the right of a tenant to question the landlord's title to the prem-

¹³² Goller v. Fett, 30 Cal. 481.

¹³³ Douglas v. Fulda, 45 Cal. 592.

¹³⁴ Fuller v. Sweet, 30 Mich. 237; and see Camarillo v. Fenlon, 49

Cal. 205; Martindale on Conveyancing, 350.

¹³⁵ Sands v. Hughes, 53 N. Y. (8 Sick.) 287.

¹³⁶ Chit. Con. (11 Am. ed.) 463.

ises, is one of convenience merely, but having a tendency to circumvent fraud and facilitate the leasing of real property and when the tenant has entered under the plaintiff's grantor, and maintains the possession thus acquired, as well as when he has entered under the plaintiff, he should, by proper evidence, bring himself within the exceptions to the rule. The considerations which indulge the rule in favor of the landlord's title apply with equal force to that of his assignee, and the tenant is not injured when his rights against the landlord are, primarily at least, made the measure of his rights against the assignee. It follows as a corollary that when compelled to admit the title of the landlord under whom he occupies as tenant at will, he must also be held to admit the landlord's right to collect the rent and to do those acts which the owner of property may lawfully do, among which is the right to terminate an estate at will by a conveyance of the property.

The rule is stated by Baldwin, Justice, in a case in the Supreme Court of the United States, that "if a tenant disclaims the tenure, claims the fee adversely in right of a third person or his own, or attorns to another, his possession then becomes a tortious one by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment, he also affirms the tenancy and goes for the forfeiture."¹³⁷ A similar doctrine was laid down in a case in the Supreme Court of Vermont.¹³⁸ But a contrary doctrine is held in Wisconsin and Alabama.

The well settled rule of the common law is, that if the tenant does any act inconsistent with his character as tenant, as if he impugns the title of the lessor, affirms by matter of record the fee to be in a stranger, claims a greater estate than he is entitled to, or claims the estate in fee, by any mode of conveyance which has the effect of divesting the estate of the reversioner, as by a feoffment, or other common

¹³⁷ Willison v. Watkins, 3 Pet. R. 43, 49.

¹³⁸ Sherman v. Champlain Transportation Co., 31 Vt. R. 110.

law conveyance, a forfeiture will thereby be incurred, and the landlord may re-enter upon him and resume possession.¹³⁹

COMMENCEMENT OF LEASES.

§ 130. **Beginning of a lease — length of term.** Unless otherwise stipulated the rights of the lessee to the occupation of the leasehold property will commence from the date of the instrument creating the term. And in computing its duration, the rule is to exclude the first day, and include the last. Another rule, of perhaps universal application, is to compute the time by calendar and not lunar months. Generally, it may be said, in the case of leases from year to year, that all of the anniversary day is to be included. There is a disposition in some localities to follow the system inaugurated by the fire insurance companies, and terminate the lease at noon on some day specified. Where it is certainly competent for the parties to enter into any lawful stipulation, it may be well to remember that as a general rule the law knows nothing of a fraction of a day.

The time for which the leasehold term is to run must be certain or be capable of being made certain. If no date is mentioned in the contract the lease will commence to run from the time of its delivery.¹⁴⁰ The New Hampshire court says, "the term commences to run from the date of the lease itself."¹⁴¹ So the term may commence at any time in the future, if it does not contravene the rule against perpetuities by vesting in possession at some date beyond two lives in being, or one life in being plus twenty-one years, and the period of gestation.¹⁴²

In the new (perhaps the better expression would be the newest), constitution of New York, which took effect on the first of January, 1895, it was provided that "no lease or grant of agricultural land for a longer period than twelve years, thereafter made, in which should be reserved any rent or service of any kind, should be valid."¹⁴³ By a law of the New York Legislature, passed May 13, 1846, distress for rent

¹³⁹ Taylor's Land. and Ten., sec. 488.

¹⁴⁰ Depond v. Olmsted, 5 Daly, 398.

¹⁴¹ Keyes v. Dearborn, 12 N. H. 52.

¹⁴² Whitney v. Allaire, 1 N. Y. 311.

¹⁴³ Const., art. 1, sec. 13.

was abolished, and the provisions of the Revised Statutes vol. 1, p. 476, giving preference to landlord's claims for rent over judgment-creditors, were repealed. (It has been declared that the Act of May 13, 1846, does not abolish the right of re-entry in the manner prescribed by the Revised Statutes.¹⁴⁴ The statute remedy of re-entry by ejectment has been applicable by and to the parties to leases in fee, and this remedy is not impaired by the Act of May 13, 1846.)¹⁴⁵ It will be perceived that these are momentous changes in long-established law.

§ 131. Covenants and conditions. A lease with an express covenant for quiet enjoyment implies covenant that the lessor has power and right to convey it. The implied covenant is broken if the lessor has made a prior and still outstanding lease of part of the premises. A recovery of the premises by the prior lessee is such an eviction as constitutes a breach of the covenant for quiet enjoyment; and the lessee may recoup his damages from the rent due.¹⁴⁶

Every lease implies a covenant for quiet enjoyment, but it extends only to the possession, and its breach, like that of a warranty of title, arises only from eviction by means of title. It does not protect against entry and ouster of a tort-feasor. The tenant may call his landlord into his defence, and if eviction follows as a result of a failure to defend him he can then refuse to pay rent, and fall back upon this covenant for quiet enjoyment to recover his damages.¹⁴⁷

As a general rule there is no warranty implied in the letting of premises that they are reasonably fit for occupancy. The lessee assumes all risk as to the quality of the premises in the absence of any controlling agreement on the subject. The rule of "*caveat emptor*" applies, and if he is injured through the unsafe condition of the property, he is remediless as against the lessor. In nearly all cases where the les-

¹⁴⁴ Williams v. Potter, 2. Barb. S. C. R. 316; Van Rensselaer v. Snyder, 9 Id. 302; affirmed by the Court of Appeals, s. c. 13 N. Y. (3 Ker.) 299.

¹⁴⁵ Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104; Laws of Sess. 69th, chap. 274.

¹⁴⁶ McAllister v. Landers, 70 Cal. 82.

¹⁴⁷ Mark v. Patchen, 42 N. Y. 171; Schuylkill R. R. Co. v. Schmoele, 57 Pa. St. 273.

sor has been held liable active negligence has been shown as a factor in the case.¹⁴⁸ It is undoubtedly true that, under appropriate circumstances, the law will indulge the injured party in an action of tort. Regarding this action, it must be premised that there is great confusion in the authorities as to the exact location of the dividing line between actions on contract and actions on tort. Now, it is elementary knowledge that when a cause of action arises through the mere breach of some promise, the action is one on contract. If, on the other hand, negligence — such as imposes the idea of constructive fraud — becomes the basis of the action, it is considered as sounding in tort. In other words there must be some breach of duty distinct from breach of contract. And it may be regarded as a general rule, that to sustain the averments in an action of tort there must be proof of some active negligence or misfeasance.¹⁴⁹

The general rule is firmly established that no implied covenant for repairs can be raised against the lessor. The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business or use. The intending tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair, and are suitable for his use. If he wishes to protect himself against the hazards of subsequently accruing accidents or defects requiring repairs, he must do so by proper covenants in his contract of lease. He takes his leased premises for better or for worse, as an ancient authority aptly characterizes his taking. He takes the premises as he finds them, and he must return them, as nearly as possible, in like condition. This necessarily involves his making repairs on the property during the term of his lease. And all this must be true — all this is true — whether he leases one room or six, the whole or a part of the house. If he rents the whole, the wisdom and necessity of his protecting himself in his contract by stipulating for repairs by his landlord appears to be not less, but greater, than if he rents a part only. The rule extends to the whole premises, and to every part of the premises. The duty of the tenant to ex-

¹⁴⁸ *Bowe v. Hunking*, 135 Mass. 380.

¹⁴⁹ *Gill v. Middleton*, 105 Mass. 477.

amine the premises, and protect himself by proper stipulations in his contract of lease if danger is suggested by his examination, is the same in case of the leasing of the whole or of part only. He cannot fix liability upon his lessor by some supposed implied covenant to repair, when he had it in his power to create this covenant expressly in the written contract, and failed to do so.

There is no implied warranty on the landlord's part that the premises demised are tenable and in good condition; the tenant is presumed to investigate for himself and provide by some appropriate stipulation in the lease, for a certain amount of repairing covering specific objects, such as roofing, painting, plastering, papering and general matters of that character. This rule is of modified application when related to passageways, staircases and door steps that are intended for general use by both landlord, tenant and the public generally, who may have occasion to do business on the premises, and in regard to these matters the landlord is very properly held to the duty of keeping such portions of the demised premises in safe and proper condition. But generally it may be affirmed that the lease does not imply any particular state of the property let, not even that it is safe or fit for human habitancy, the tenant takes the premises as they are, and must pay rent for the term unless wrongfully evicted. But this rule is limited, as we have seen, to premises which by the terms of the lease, have passed entirely out of the landlord's control, and into the exclusive possession of the tenant. Where only a portion of a building is leased the passageways and common approaches and exits are controlled by the landlord and upon him is cast the responsibility of general oversight and repairing.¹⁵⁰ The head note of a recent decision reads as follows: "A landlord who lets rooms in a building to different tenants, with the right of way in common over a staircase, is bound to use reasonable care in keeping such staircase in repair; if he fails to do so, he is liable to a tenant injured thereby while in the exercise of reasonable care; and the fact that the tenant uses the staircase after knowing that it is in a dangerous condi-

¹⁵⁰ Readman v. Conway, 126 Mass. 374.

tion is not conclusive evidence that he is not in the exercise of due care."¹⁵¹ There has been a morbid excess of comment, spoken and written, on this subject, but the practitioner can evade a needless extension of labor by assuming that the foregoing epitome of the rule is absolutely correct. The formula is, and has been, dislocated and mangled by various writers under the pressure of hasty composition but the effort in all instances is to approximate to this meaning.

Under the common law there is no implied contract upon the part of the landlord that the demised premises are tenantable, or of any particular character of construction, and no liability rests upon the landlord, except in case of fraud, for their condition.¹⁵²

The same rule, except where some question as to the landlord's duty to make repairs arises, applies when a portion of the premises are leased with the license or privilege on the part of the tenant to use other portions of the premises. The landlord warrants nothing, and is under no liability in respect to the plan or construction of the building.¹⁵³

It has been repeatedly held that an assessment, made under an act not in existence at the time of the execution of a lease, is not included in a tenant's covenant to pay taxes and assessments.¹⁵⁴ Where a lessee covenants to pay such assessments, he in fact agrees to pay such assessments only as are valid, or such as can be legally enforced against the lessor or against the property.¹⁵⁵

There is no restriction imposed by law on the number of covenants in a lease. Anything lawful in itself, and not endangering public policy or morals, may be the subject of a covenant. But stipulations of this nature should be expressly set forth in the instrument itself, as in no instance will the law imply a covenant in a lease for years except that of quiet enjoyment. This covenant merely imports that

¹⁵¹ *Looney v. McLean*, 129 Mass. 33.

¹⁵² *Wood, Land. & Ten.*, sec. 382; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255, and cases cited.

¹⁵³ *Woods v. Naumkeag S. C. Co.* 134 Mass. 357, 45 Am. Rep. 344; 6 Am. L. Rev. 614.

¹⁵⁴ See *Love v. Howard*, 6 R. I. 116; *Oswald v. Gilfert*, 11 Johns. 443; *Bleecker v. Ballou*, 3 Wend. 263.

¹⁵⁵ *Clark v. Coolidge*, 8 Kan. 189.

the tenant is not to be evicted during his term by title paramount.¹⁵⁶

It is an universal rule that upon the demise of real estate there is no implied warranty that the property is fit for occupation or suitable for the use or purpose for which it is hired.¹⁵⁷ But there is an implied covenant for quiet enjoyment¹⁵⁸ unless there is an express covenant.¹⁵⁹

Every lease for years has as its pendent and inseparable accompaniment, the right of quiet enjoyment.¹⁶⁰ This has been previously referred to. This covenant is broken whenever an eviction, actual or constructive, can be established as directly resulting from the procurement of the landlord.¹⁶¹ The subject of eviction is carefully examined at the close of the chapter, but in this immediate connection it may be said that it need not take the character of a violent physical expulsion, but it may result, and frequently does, from those insidious, nagging practices, insignificant in themselves, but intolerable in their aggregation by which the tenant's occupancy is interfered with, and his enjoyment of the premises demised impossible. Eviction need not extend over the entire part of the property leased. It is sufficient if in any way the encroachment is against the tenant's right. He has stipulated for the possession of the entire property, not for some fractional part of it, nor for such as the landlord's whim sees fit to give him. He is at liberty to repose upon his whole right, and treats any evasion of those rights as an eviction. It does not lie in the landlord's mouth to say "I will rebate the rent *pro tanto* as a recompense for this invasion." The tenant is bound to accept no such proposition. He has been deprived of the beneficial use of some part of the premises, in other words, evicted from a part thereof, and he may

¹⁵⁶ Burr v. Stenton, 43 N. Y. 462.

¹⁵⁷ Edwards v. New York & H. R. R. Co., 98 N. Y. 245; Naumberg v. Young, 15 Vroom. 331; Krueger v. Farrant, 29 Minn. 385; Wilkinson v. Clauson, 29 Id. 91; Kerr v. Merrill, 4 Mo. App. 591.

¹⁵⁸ Edwards v. Perkins, 7 Ore. 149; Field v. Herrick, 10 Ill. 591.

¹⁵⁹ O'Connor v. Memphis, 7 Lea. (Tenn.) 219; see 4 Wait's Act. & Def. 235; 8 Id. 368.

¹⁶⁰ The covenant for quiet enjoyment goes to the possession and not to the title. 3 Johns. 471; 2 Hill, 105; 4 Cow. 340; 9 Met. 63.

¹⁶¹ Colburn v. Morrill, 117 Mass. 262.

treat such acts as suspending the rent and releasing him from all further obligations as a tenant.¹⁸²

A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words the agreement is made. And the measure of damages for the breach of such a covenant is the value of the unexpired term of the lease at the time of the eviction, over and above the rent reserved by the terms of the lease. For a breach of contract in the sale of personal property the measure of damages is the difference between the contract and the market price. But the same rule has not been applied against the vendor or lessor of real estate.¹⁸³ It was held by the Court of Common Pleas, in a case referred to that court by the Master of the Rolls, for its opinion, and upon a very elaborate argument, that the lessee, upon a covenant for quiet enjoyment, was entitled to recover the value of the term lost, as well as for mesne profits paid to the owner of the paramount title. The same question came again before that court in *Locke v. Furze*, 19 J. Scott, N. S. 96 and 115 Eng. Com. Law, 94. The English and American cases were carefully reviewed, and the whole court, sanctioned, re-asserted and re-affirmed the rule formulated in *Williams v. Burrell*, *supra*, to the effect that a lessee that has been ousted by virtue of title paramount, is entitled to recover, under the implied covenant of quiet enjoyment, the value of the leasehold term which he was deprived of. In *Myers v. Burns*, 35 N. Y. 272, the Court of Appeals of that State asserted and adopted the same principle.

The measure of damages for the breach of the lessee's covenant to keep in repair, and to surrender the demised premises at the end of the term in as good order and condition as they were at the beginning of it, is the amount of money necessary to accomplish all that the lessee failed to do; in other words, the cost of making the repair.¹⁸⁴

¹⁸² *Sherman v. Williams*, 113 Mass. 481; *Royce v. Guggenheim*, 106 Mass. 201; *Leishman v. White*, 1 Allen, 489; *Christopher v. Austin*, 11 N. Y. 216.

¹⁸³ *Sedgwick on Measure of Dam-*

ages, 150-204; 4 Kent's Com. 479; *Williams v. Burrell*, 1 M. G. & Scott, 402; 50 Eng. Com. Law Rep. 401.

¹⁸⁴ *Vivian v. Champion*, 2 Ld. Raymd. 1125; *Mayne on Damages*, 229.

§ 132. **Improvements and repairs.** Assuming the lease to be silent on the subject, if the lessee for years erects valuable improvements upon the premises demised, he is not at liberty to remove them on the expiration of the term. It is his own folly to improve another's land, and he cannot recover the least part of his expenditure.¹⁶⁵ This clearly appears by referring to chapter I, on the subject of Fixtures. And, in the matter of general repairing, the rule is that he takes the premises as he finds them — barring such latent defects as would not ordinarily come under notice, and which is the landlord's duty to disclose — and is bound to make ordinary repairs.¹⁶⁶ But is not liable for elemental damage nor for mob violence.¹⁶⁷

He is, therefore, bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises, but he is not required to put a new roof on a ruinous building.¹⁶⁸ An express covenant on the part of the lessee to keep a house in repair, and leave it in as good a plight as it was when the lease was made, does not bind him to repair the ordinary and natural decay.¹⁶⁹ And it has been held that such an agreement does not bind him to rebuild a house which has been destroyed by a public enemy in time of war.¹⁷⁰

§ 133. **Assignment and subletting.** A lessee has a right, unless restrained by covenant, to assign his lease or to underlet.¹⁷¹ Leases, therefore, frequently contain covenants on the part of the lessee not to assign or underlet without the written consent of the lessor; but this restriction is not favored, and the courts are inclined to a strict construction of it, and nothing short of an actual and voluntary transfer of the lessee's interest will ordinarily be considered a breach of the covenant against assignment.¹⁷²

¹⁶⁵ Gay v. Joplyn, 13 Fed. Rep. 650.

¹⁶⁶ Mumford v. Brown, 6 Cow. 476; Perez v. Raybaud, 76 Tex. 191.

¹⁶⁷ Elliott v. Aikin, 45 N. H. 36; Wells v. Castles, 3 Gray, 323; Gibson v. Eller, 13 Ind. 128.

¹⁶⁸ 2 Esp. N. P. C. 590.

¹⁶⁹ Woodf. L. & T. 256.

¹⁷⁰ 1 Dall. 210.

¹⁷¹ Church v. Brown, 15 Ves. 264.

¹⁷² McNeil v. Kendall, 129 Mass. 245; Hargrave v. King, 5 Ired. Eq. 430; Collins v. Hasbrouck, 56 N.

An assignment of a term is the transfer of the whole estate of the tenant therein to a third person, and differs from a lease in this: That by the latter the lessor grants an interest less than his own, reserving to himself a reversion, but by an assignment he parts with the whole property.¹⁷³ And so it is said in *Brown on the Statute of Frauds*, sec. 411, speaking of the English Statute of Frauds of 29 Car. II: "If the statute were entirely silent as to assignments, they could not in reason be made verbally of such terms as require a writing to create them; for if, as is clear, the statute against creating a parol lease applies to those which are carved out of a term as well as out of the inheritance, it cannot be that a termor can assign his whole interest verbally when he could not underlet a part of it without writing."¹⁷⁴ In *Briles v. Pace*, 35 N. C. 279, the question was whether under statutes of North Carolina prohibiting leasing, subject to certain restrictions, unless in writing, verbal assignments of terms, subject to like restrictions, were prohibited, and it was held that they were; the court, among other things saying: "It is next to be observed that the creation of a term by the owner of the inheritance of a greater duration than three years, and the transfer of such a term by contract, stands precisely on the same reason as to the danger of fraud and perjury in claiming under them. Therefore, it is natural that they should be placed on the same footing in the statute; and the act, as a remedial one, should be construed as thus placing them, if the words will allow it. The words in these statutes in truth, embrace the transfer of terms, as well as the creation of them. They are that all contracts to sell or convey land, and any interest in or concerning it, shall, with one exception, be void, unless in writing. Now, a term for years is not only an interest, but it is an estate in land; and therefore a contract to assign a term is a contract to sell and convey land. Besides, it is a mistake to suppose that the statute, in respect to the creation of terms, embraces only those created imme-

Y. (11 Sick.) 157, 15 Am. Rep. 407; sec. 426; *Sexton v. Chicago Storage*
Moore v. Pitts, 53 N. Y. (8 Sick.) Co., 129 Ill. 318.
 85; *Dunlap v. Bullard*, 131 Mass. ¹⁷⁴ See to like effect also *Reed*,
 161. Stat. Fr. sec. 766.

¹⁷³ Taylor, Land. & Ten. (2d ed.)

diately out of the inheritance; for it speaks of all contracts for lands, which includes, of course, all leases created in any manner, other than those of three years or under, which are expressly excepted. Therefore, if a termor underlets the premises, or a part of them, for part of the term, so as to leave a reversion in himself, that is a new term created out of the former, and is within the words of the act; and, if it be for more than three years, it must clearly be in writing. The inference, then, seems irresistible that such a long termor cannot assign without writing, for it would impute an absurdity to the Legislature to suppose a writing indispensable for a termor to pass a part of his estate, while he is allowed to pass the whole by an assignment by word of mouth." In *Potter v. Arnold*, 15 R. I. 350; 2 New Eng. Rep. 621, the Supreme Court of Rhode Island holds that an oral assignment of a term is prohibited by language in their statute which prohibits the sale of "lands, tenements and hereditaments, and the rights thereto and interests therein," unless in writing.

When a lease is assigned, and the assignee enters under it, he becomes tenant of the lessor; he is bound by all the covenants of the lease which are not personal to the lessee and he is liable to the lessor for all rents which accrue while he holds the estate. If there is no express covenant for the payment of rent, contained in the lease, then the covenant implied from the reservation of rent binds the lessee, and runs with the land so as to bind the assignee also.¹⁷⁶ The obligation of the assignee is implied by law from his acceptance of the assignment, and his entering upon the enjoyment of the estate.¹⁷⁶

It is not necessary for the lessor to formally recognize the assignee as his tenant otherwise than by his suit for the rent.¹⁷⁷

An assignment creates no new estate, but transfers an existing estate into new hands. An under lease creates a perfectly new estate.¹⁷⁸

¹⁷⁶ *Croade v. Ingraham*, 13 Pick. 33; *Blake v. Sanderson*, 1 Gray, 332; *Smith, Land. & Ten.* 587; 1 Wash. Real. Prop. 326; 4 Blytherwood, Conveyancing, 388.

¹⁷⁶ *Sanders v. Partridge*, 108 Mass. 556.

¹⁷⁷ *Id.*

¹⁷⁸ *Comyn on L. & T.* 51, 52.

Surrender may be implied from acts inconsistent with the continuance of the tenancy, and it may be by express agreement.¹⁷⁹ And it will follow as an obvious corollary, that the acts and statements of the landlord himself may furnish conclusive evidence of the acceptance of the surrender.¹⁸⁰ The recovery by an action by the landlord should be for the rent accrued less the amount received from the new tenant, in case the landlord does not accept the surrender but after the vacancy occurs, leases to another.

Notice to quit. Unless changed by statutory provision, six months' notice is required to terminate an estate from year to year.¹⁸¹ In some States three months is the period assigned.

Where a tenant, under a lease containing no restrictions upon subletting, sublets a portion of the premises and subsequently, without the knowledge or assent of the sub-tenant, surrenders his term to the owners, such surrender and the consequent merger of the greater and lesser interest, terminate the original lease and the term created thereby as between the parties to the lease and the surrender. But the interests and the terms of the sub-tenant continue as if no surrender had been made. The surrenderees and owners in fee become his immediate landlords, with only such rights as his lessor would have had to the possession of the premises before the expiration of the term.¹⁸²

In a case decided by the Supreme Court of the State of New York, the lease and counterpart contained a provision not "be let or underlet without the written consent of the landlord, under the penalty of forfeiture and damages." In the counterpart signed by the lessee, he "engages not to let or underlet the whole or any part of said premises without the written consent of the landlord, under the penalty of forfeiture and damages." It was contended by counsel that these words did not make a condition, the breach of which would terminate the lease. The court, however, construed

¹⁷⁹ *Enyeart v. Davis*, 17 Neb. 224;
Donkersley v. Levy, 38 Mich. 54.

¹⁸⁰ *Welcome v. Hess*, 90 Cal. 507;
Witman v. Watry, 31 Wis. 638;
Auer v. Penn, 99 Pa. St. 370.

¹⁸¹ *Den v. Drake*, 14 N. J. L. 523;
Brown v. Keyser, 60 Wis 1.

¹⁸² *Eton v. Luyster*, 60 N. Y. 252;
Krider v. Ramsay, 79 N. C. 354;
Martindale on Conveyancing, 333.

the word "forfeiture," to mean forfeiture of the term and estate. Emott, J., who delivered the opinion of the court, after giving the construction as above, said: "There is no other sensible meaning which can be attached to it, and, while courts will construe strictly clauses which create conditions and go to defeat estates, that does not mean that we have a right to disregard the obvious intentions of parties, or the reasonable use of their words, in such an instrument as this, although they may be inartificially expressed."¹⁸³

A tenant is said to attorn when he agrees to become the tenant of the person to whom the reversion has been granted.

"A DISTINCTION NOTED."

a. *The difference between assignment and subletting.* The distinction is admirably pointed out by Judge Rapallo in *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601. When the lessee assigns his whole estate, without reserving any reversion therein to himself, a privity of estate is at once created between his assignee and his original lessor, and the latter has a right of action against the assignee on the covenant to pay rent, or any other covenant in the lease, which runs with the land. But if the lessee sublets the premises, reserving or retaining any such reversion in himself, however small, the privity of the estate is not established, and the original landlord has no right of action against the sub-lessee, there being neither privity of contract or of estate between them.¹⁸⁴ The characteristic difference between an assignment of his lease and an underletting by the original tenant resides in the inquiry, has the primary lessee transferred his whole and entire estate and completely parted with his title, or has he retained in himself some fragment or shred of his estate, either substantial or even formal or technical.¹⁸⁵

The rule we have suggested is the doctrine of all the text writers, supported by the great weight of authority, and by the later and best considered cases. In 1 Wood, Land & Ten.,

¹⁸³ *Lynde v. Hugh*, 27 Barb. R. 415, 420, 421.

¹⁸⁴ *Taylor, Land. & Ten.* 109; see *Ganson v. Tiff*, 71 N. Y. 48.

¹⁸⁵ But see *Collins v. Hasbrouck*, 56 N. Y. 157.

Am. ed. sec. 258, it is said: "An assignment, as contradistinguished from a sub-lease, signifies a parting with the whole term; and whenever the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for non-payment are reserved to himself, yet the instrument amounts to an assignment, and not a sub-lease; and in such case the person to whom it is made over may sue the original lessor or his assigns of the reversion, or be sued by them, as assignee of the term on the respective covenants in the original lease, which run with the land, even though new covenants are introduced into the assignment." So, on page 124, a "lease" is defined to be a conveyance by way of demise, always for a less term than the party conveying has in the premises.¹⁸⁶

Mr. Taylor says: "It is essential to a lease that some reversionary interest be left in the lessor, for, if by an instrument purporting to be a demise, he parts with his whole term, it will amount to an assignment of the term." This results by operation of law, without regard to the particular form of the instrument. The doctrine that reservation of rent, or a right of re-entry, is to be construed as a sufficient reversion, is declared by the last-named writer to be contrary to settled authority. And the rule is summed up by Mr. Wood, vol. 1, p. 179, note, as follows: "The weight of authority supports the rule that, in order to create a lease instead of an assignment, there must be a reservation of a reversion in the lessor, and that no form of an instrument can dispense with this requisite. A mere reservation of rent, or a right of re-entry for a breach of any of the conditions of the lease, will not change the legal relations of the parties * * * and the introduction of covenants into the instrument does not change the legal effect of giving up the reversion."¹⁸⁷ It is also well settled that the same instrument may in law create an assignment of the term, as between the original lessor and the assignee, and also the relation of landlord and tenant between the parties to the second demise.¹⁸⁸ But this is the

¹⁸⁶ Taylor, Land. & Ten. sec. 16;
¹ Wood, Land. & Ten. sec. 327.

¹⁸⁸ Stewart v. Long Island R. Co.
 102 N. Y. 608, 4 Cent. Rep. 115, and
 cases.

¹⁸⁷ Woodhull v. Rosenthal, 61 N.
 Y. 382.

result of contract only, and not conclusive on the original lessor, who comes into privity of estate by reason of the grant or assignment of the whole term.¹⁸⁹

This distinction seems to be lost sight of in some of the cases. In others it is held that the introduction of a surrender clause determines the character of the instrument, and implies a reservation. But no such effect can be given to a covenant which only becomes operative, as in this case, after the expiration of the term.¹⁹⁰ So the right of re-entry is not an estate or interest in land, nor does it imply a reservation of a reversion. It is a mere chose in action. When enforced, the grantor is in through the breach of the condition, and not by the reverter.¹⁹¹

In the case last cited the subject is fully considered, and the authorities, including those in New York and Massachusetts, carefully reviewed and distinguished.

§ 134. Termination of leases—how effected. In contemplation of law a state of things once shown to exist is presumed to continue till the contrary is shown.¹⁹² This presumption will be indulged with reference to a tenancy.¹⁹³ And where it is once shown that the tenancy exists, the presumption of continuance follows so long as the tenant remains in possession. Generally the terms of tenancy are fixed by express agreement. In such case it terminates without demand or notice on the expiration of the term designated. Or, specifically, it expires by limitation upon the last moment of the anniversary of the day from which the tenant was to hold in the last year of his tenancy.¹⁹⁴ In a lease for the life of a third person the lease terminates upon the death

¹⁸⁹ *Sexton v. Chicago Storage Co.* 129 Ill. 327, and cases.

¹⁹⁰ *Stewart v. Long Island R. Co.* *supra*; *Blumenberg v. Myres*, 32 Cal. 95, 91 Am. Dec. 560; *Schilling v. Holmes*, 23 Cal. 230.

¹⁹¹ *Tiedeman*, Real Prop. sec. 277; *Sexton v. Chicago Storage Co.* 129 Ill. 332.

¹⁹² 1 Rice, Ev. 66, citing *Kidder v. Stevens*, 60 Cal. 416; *Mullen v.*

Prior, 12 Mo. 307; *Eames v. Eames*, 41 N. H. 177; *Garner v. Green*, 8 Ala. 96; *Hood v. Hood*, 2 Grant Cas. 229; *Gould v. Norfolk Lead Co.* 9 Cush. 338; *Montgomery Plank Road Co. v. Webb*, 27 Ala. 618.

¹⁹³ *Keane v. Cannovan*, 21 Cal. 291.

¹⁹⁴ *Chesley v. Welch*, 37 Me. 106; *Bedford v. McElherron*, 2 S. & R. 49; *Rich v. Keiser*, 54 Pa. St. 86.

of such person, and similarly the expiration of any period for which a tenancy is created will terminate it, and so will the happening of any event upon which the life of the tenancy is dependent.¹⁹⁵

a. *Destruction of premises by fire.* The total destruction of the premises leased, is generally held to put an end to the lease.¹⁹⁶ Especially where there is no covenant to repair, or the landlord having covenanted to repair or rebuild, refuses to do so.¹⁹⁷

Where the landlord is bound to keep the premises in tenantable repair, his failure to do so has also been held to terminate the lease¹⁹⁸ but not where their defective condition is chargeable to the tenant's own neglect of duty.¹⁹⁹

Destruction by fire does not oblige the landlord to rebuild. Under the old common law abominations, the tenant was still liable for rent. But under modern statutory regulations, this and other hardships have been swept away, and in most instances he may exercise a right of election — either remain in possession or vacate. In the absence of a right to re-enter and build, the landlord cannot take possession to the exclusion of the tenant and against his will. But while this is true, slight evidence will raise the presumption that the tenant had consented to the re-entry of the landlord for the purpose of reconstruction.²⁰⁰

It has been held that if the thing leased is totally destroyed, as where the lease is of particular apartments in a building which is destroyed by fire, the lessee having no interest in the land, the lease will perish with the subject-matter.²⁰¹ A demise of the basement rooms of a building of several stories in height, without any stipulation by lessor or

¹⁹⁵ *Livingston v. Tanner*, 14 N. Y. 64; *Hamit v. Lawrence*, 2 A. K. Marsh, 368; *Logan v. Herron*, 8 S. & R. 459.

¹⁹⁶ *Winton v. Cornish*, 5 Ohio, 477; *Stockwell v. Hunter*, 11 Metc. 448.

¹⁹⁷ *Ainsworth v. Ritt*, 38 Cal. 89; *McMillan v. Solomon*, 42 Ala. 356; *Fowler v. Payne*, 49 Miss. 32; *Graves v. Berdan*, 26 N. Y. (12 Smith) 498.

¹⁹⁸ *Coleman v. Haight*, 14 La. Ann. 564.

¹⁹⁹ *Suydam v. Jackson*, 54 N. Y. (9 Sick.) 450; *Johnson v. Oppenheim*, 55 Id. (10 Sick.) 280.

²⁰⁰ *Smith v. Kerr*, 108 N. Y. 31; *Weed's Land & Ten.*

²⁰¹ *Graves v. Berdan*, 26 N. Y. 498; *Kerr v. Merchants' Exchange*, 3 Edw. Ch. (N. Y.) 315.

lessee for rebuilding in case of fire or other casualty, gives the lessee no interest in the land, though he pays all the rent in advance; and if the whole building is destroyed by fire, his interest in the rooms is terminated²⁰² and he cannot cover over the cellar and use it, though his lease has not expired by several years.²⁰³ By statute in New York, Connecticut, Ohio and Minnesota, destruction of premises allows tenant to quit and surrender.²⁰⁴

A lease of rooms in a building, in which other rooms are leased to different tenants, gives the lessee no interest in the land, and is terminated by the total destruction of the premises by fire. This rule proceeds upon the principle that the room is the thing leased and the destruction of the premises necessarily terminates the lessee's interest therein.²⁰⁵

In the presence of direct stipulations, frequently found in modern leases, by which the lessor agrees in effect that in the event of fire he will, within a reasonable period thereafter, repair or rebuild the premises demised, the rule above outlined vanishes, and where it is evident on a full consideration of the entire lease that an interest in the land itself was included in the terms of letting, we find ourselves in the presence of another rule; in both such cases there may be an abatement of some equitable portion of the rent during the rehabilitation of the building, but the liability for rental value reasserts itself immediately when the tenement is restored to its former condition.²⁰⁶

As applied to a lease, the doctrine of the law is, when it is not the intention to grant any interest in the land further than is necessary for the enjoyment of the room leased, that when such room is destroyed there is nothing upon which the demise can operate, and that the lease terminates with the destruction of the thing leased.²⁰⁷ The application of this doctrine is well illustrated in the case of *Stockwell v. Hunter*,

²⁰² *Stockwell v. Hunter*, 11 Metc. 448.

²⁰³ *Winton v. Cornish*, 5 Ohio, 477.

²⁰⁴ *Stimson's Am. Stat. sec. 2062*; *Martindale on Conveyancing*, 352.

²⁰⁵ See *Ainsworth v. Ritt*, 38 Cal.

89; *Graves v. Berdan*, 26 N. Y. 498; *McMillan v. Solomon*, 42 Ala. 356.

²⁰⁶ *Shawmut National Bank v. Boston*, 118 Mass. 125.

²⁰⁷ *Harrington v. Watson*, 11 Or. 143.

11 Met. 448, in which this question was carefully considered. In that case the lessor of a three-story building leased the cellar or basement to a tenant for five years, and the other stories to other tenants; but the lease contained no stipulation as to rebuilding in case of fire, and it was held that the destruction of the building terminated the lessee's rights in the premises. It was put upon the ground that such lease of distinct rooms or apartments do not carry any interest in the land beyond that connected with the enjoyment of the particular room, that the room was the thing leased, and that the destruction of the thing leased necessarily terminated the lessee's interest therein. The real question in all such cases, is whether the intention of the parties collected from the whole instrument, was to grant any estate in the land.

Frequently at the instigation of the lessor a stipulation is inserted in the lease to the effect that the lessee shall pay a certain definite sum named as rent, and also all taxes which may be assessed upon the property during the continuance of the term. A further stipulation is usually found by which the lessor is allowed a reasonable time in which to rebuild the premises should they be destroyed by fire, and in the latter event it is further provided that there shall be a suspension of rent during such period. Under such a condition of things the taxes are still to be paid by the lessee even when levied during the expulsion of the tenants by the happening of a fire or other casualty.²⁰⁸

The courts are not at liberty to alter the agreement of the parties on the mere suggestion that the logic of events has interposed a hardship.

A clause in a lease, excluding the liability of the tenant to restore the house in case of fire, does not relieve him from paying rent in case of destruction by fire.²⁰⁹ A lessee who covenants to restore the premises at the end of the term "in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the lessor," and to pay rent during the term, is not excused from paying rent by the undermining of the partition-wall by the owner of

²⁰⁸ Minot v. Joy, 118 Mass. 308

²⁰⁹ Beach v. Farish, 4 Cal. 339.

land adjoining, while building upon his own premises, after his notice to the lessor of his intention to build, and the lessor's omission to support the wall; even if, by the custom of the place, the landlord is bound to support and secure his foundations and walls in such cases.²¹⁰

So, if the lessor covenant to repair, the covenant runs with the land, and the assignee of the reversion will be bound to repair.²¹¹

b. *By efflux of time, or the happening of a particular event.* It is well said by Mr. Adams, that the power of determining a tenancy is necessarily consequent upon the right of creating one; and the law implies a mutual reservation of such power in all contracts between landlords and tenants, whenever it is not expressly reserved. Whenever such power is expressly reserved, the determination of the tenancy is, of course, dependent upon the terms of the reservation; and the tenancy will cease when the term ends, the event happens, or the covenants are broken; but if there is no express reservation, but the party is let into possession as tenant under a general holding, the law creates between the parties a tenancy from year to year, determinable by a notice to quit from either, by the landlord or tenant. This is the rule, in brief, as stated by Mr. Adams, and it cannot be any better expressed.²¹²

The tenant's liability for rent is in no way affected by merely vacating the premises and surrendering the key. If the landlord refuses to accept the surrender, the fact that he has accepted the key and placarded the premises for rent will in no way interfere with the lessee's liability for the rent, and the lessor's right to hold him for it.²¹³ To effectuate a legal surrender the tenant's renunciation of the premises must be accepted by the landlord.²¹⁴ There must be no qualification or reservation of a right to sue for the loss occasioned by being compelled to let the premises at a reduced

²¹⁰Kramer v. Cook, 7 Gray (Mass.), 550.

²¹¹Allen v. Culver, 3 Denio's R. 285.

²¹²Adams on Eject. 73.

²¹³Auer v. Penn, 99 Pa. St. 370; Tolle v. Orth, 75 Ind. 298; Thomas v. Nelson, 69 N. Y. 118.

²¹⁴Milling v. Becker, 96 Pa. St. 182. See Auer v. Penn, *supra*.

figure.²¹⁵ But there is authority for holding that the re-entry of the landlord upon the abandoned premises, coupled with other acts, may imply an acceptance of the surrender when other affirmative acts of acceptance clearly appear. The whole question is shrouded in more or less obscurity. That acceptance of the surrender is a forfeiture of all future right to the recompense of rent is elementary.²¹⁶ The dubiety lies in determining what specific acts constitute acceptance. Ordinary precaution would induce the landlord to take the key. Good business principles would suggest his leasing the premises. Such acts taken together cannot fairly import an intention to release the tenant from his obligations under the contract. It would seem from the case last cited that in order to hold, the landlord should promptly notify him to that effect. Certainly that is the better course. The case of *Bowen v. Clark*, 22 Oreg. 566, would seem to sustain this view. At all events it is a precautionary suggestion.

Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice Rogers in *Marseilles v. Kerr*, 6 Whart. 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release, or an eviction will undoubtedly relieve a tenant, and it was said by Chief Justice Gibson, in *Fisher v. Milliken*, 8 Barr. 111, that nothing less would do so. This remark, however, was without the authority of the court, and must be regarded as dictum. The case in hand does not require us to assert so broad a proposition. There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was

²¹⁵ *Randall v. Rich*, 11 Mass. 494;
Deane v. Caldwell, 127 Mass. 242.

²¹⁶ *Underhill v. Collins*, 132 N. Y.
269; *Welcome v. Hess*, 90 Cal. 507.

his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretense that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant below that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant, and must prove it. When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any. It was said in *Breuckmann v. Twibill*, 8 Norris, 58, that "taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.²¹⁷

In the case of tenancies from year to year resulting from a parol lease void under the statute of frauds, the landlord has the right, in any year of the occupancy, to terminate the tenancy on the last day of the rental year by giving due formal notice to that effect.²¹⁸ Where the lease itself fixes the period of its termination, notice to quit is unnecessary.²¹⁹ So, the lessee of an estate for years, holding over, is entitled

²¹⁷ *Auer v. Penn*, Pa. 1882. (Re- 180; *Laughram v. Smith*, 75 N. Y. reported 99 Pa. 370.) 205.

²¹⁸ *Reeder v. Sayre*, 70 N. Y. 219. *Rich v. Keyser*, 54 Pa. St. 86.

to notice.²²⁰ But he forfeits his right to notice by denying the landlord's title. In such case the law regards the estate as terminated.²²¹ The subject is largely regulated by statute, but in all cases of uncertain tenancies notice to quit is necessary. And where the tenancy is for regular recurring periods, as from month to month, thirty days' notice is required. Generally it may be said that all parties are entitled to notice to quit before they can be sued in ejectment.²²² How far a notice to quit is necessary before an action of ejectment can be brought has been much discussed in England. In this country the authorities are not uniform. In some of the States the subject is regulated by statute law, or by rules of court. In New York the question has been fully considered. The courts of that State hold that where there is a contract of purchase and the vendee enters into possession with the consent of the vendor, that ejectment will lie at the suit of the vendor without a previous notice to quit.²²³

Notice to quit is generally necessary where the relation of landlord and tenant exists, and no definite period is fixed for the termination of the estate, but where a lease is to expire at a certain time, a notice to quit is not necessary in order to recover in ejectment, because to hold over would be wrong after the duration of the estate was fixed and well known to lessor and lessee.²²⁴ It is well to remember that a tenancy may be determined in three ways: 1, By efflux of time, or the happening of a particular event; 2, By notice to quit; and 3, By a breach on the part of the tenant of any of the conditions of his tenancy, as non-payment of rent, or non-performance of covenants.

Upon the death of a tenant, the lease vests in his executor or administrator.²²⁵ It vests for the usual purposes to which

²²⁰ *Comm. v. Knarr*, 135 Pa. St. 35.

²²¹ *Tobin v. Young*, 124 Ind. 507.

²²² *Maynard v. Cable*, 1 Wright, 18; *Jackson v. Miller*, 7 Cow. 751; *Taylor v. McCracken*, 2 Blackf. 264; *Jackson v. Niven*, 10 Johns. 335.

²²³ *Smith v. Stewart*, 6 Johns. 46; *Jackson v. Miller*, 7 Cow. 747; *Whiteside v. Jackson*, 1 Wend. 418; *Jackson v. Moncrief*, 5 Wend. 26.

²²⁴ *Gregg v. Von Phul*, 1 Wall. 274.

²²⁵ *James v. Dean*, 15 Ves. Jr. 241; *Doe v. Porter*, 3 T. R. 13.

testator's assets are applied, and the legatee has no right to enter without the executor's special assent.²²⁶

Although he does not enter into possession of the premises he may be sued as assignee of the lease, for the rents, subsequent to the death of the lessee.²²⁷

Rent accruing after lessor's death, is a chattel real, and descends to the heir, and does not go to the executor.²²⁸

c. *Merger*. The doctrine of merger has been previously examined. Its principles are applicable to estates for years and wherever rights under a lease become vested in a tenant and that tenant subsequently acquires the fee of the property, the lease is drowned or merged into the greater estate. The personality of the *tenant* has disappeared. Merger is not favored and will only be allowed to operate where it is plainly equitable that it should.²²⁹

d. *By condemnation of the property under eminent domain*. *Parks v. Boston*, 15 Pick. 198, is an interesting case on the question. It was there held: "Where part of a lot of land under lease is taken by the mayor and aldermen of Boston for the purpose of widening a street, the lease is not thereby extinguished; nor is the lessee discharged from his liability to pay the reserved rent during the residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them respectively." The same principle was announced in an earlier case, *Ellis v. Welch*, 6 Mass. 246 and in a later case, *Patterson v. Boston*, 20 Pick. 159. In *Foote v. Cincinnati*, 11 Ohio, 408, where the leased premises had been appropriated for a street, the Supreme Court held that the lessee was not released from the payment of rent, but he was entitled to recover from the city for the damages sustained.²³⁰

Under the authorities, it seems that a tenant, where a portion of the leased premises is taken under the power of eminent domain for the use of the public, cannot, as against his

²²⁶ 1 Wms. Exrs. 60.

²²⁷ Wollaston v. Hakewell, 3 Man. & C. 297.

²²⁸ Green v. Massie, 13 Ill. 363.

²²⁹ Gardner v. Astor, 3 Johns. Ch.

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²³⁰ See also the following cases, where the same principle is maintained: *Wrokmán v. Miffin*, 30 Pa. 362; *Frost v. Earnest*, 4 Whart. 86; *Chicago v. Garrity*, 7 Ill. App. 474.

landlord, claim an eviction, and be released from the payment of rent; and as his liability for payment of rent continues after a part of his term has been taken by the public, and appropriated to public use, he would be entitled to recover such damages as he sustained by the taking of his leased property by the public. In other words, the lessee takes and holds his term in the same manner as any other owner of real property holds his title, subject to the right of the public to take a part or the whole of it for public use at such time as the public necessity may require, upon the payment of just compensation. In a proceeding to condemn lands for a public purpose, it is not some particular interest which the public seek to take, but the land itself. If A has one estate in the land and B another, in the proceeding to condemn, each is entitled to compensation for the land taken, as his interest may appear in the property; and, as said before, if one has a leasehold interest, he may recover damages for such interest, and still be held liable for the payment of rent, as that liability existed before the leasehold interest was taken for public use. A different rule has been adopted in some States, particularly in Missouri.²³¹

In those cases it was held that, as to the part of the leased premises appropriated to public use, the rent was extinguished and no liability existed against the lessee for such rents. But the weight of authority is the other way.

e. *Surrender and forfeiture.* Surrender imports the yielding up of an estate for life or for years to him who has the immediate reversion or remainder. Whereupon the particular estate may become extinct by mutual agreement between them.²³² It may be effected by the use of clear, definite expressions to that effect; or, it may be effected by operation of law, when the parties act in a manner implying an agreement to consider a surrender as made.²³³ It is said to differ from a release in this: a surrender occurs where a less estate falls into a greater, while a release operates by forcing the greater estate upon the less.

Where, by mutual agreement between the lessee and lessor,

²³¹ Biddle v. Hussman, 23 Mo.
597; Barclay v. Pickles, 38 Mo.
143.

²³² Co. Litt. 337.

²³³ Livingston v. Potts, 16 Johns.
28.

the former abandons his possession and the lessor resumes possession of the premises, there is a surrender by operation of law, so the lease may be surrendered by the delivery and acceptance of the key and the subsequent letting of the house during the term to another tenant, although the surrender, like other contracts affecting real property, should be in writing. If the minds of the respective parties meet in the common intent of relinquishing the relation of landlord and tenant, this is all sufficient. In the English case of *Grimman v. Legge*, 8 B. & C. 324, the tenant notified the landlord that he should quit, the latter said that he might do so. The tenant removed his furniture, delivered his keys which were accepted, and the lease was held to be terminated; and where the old lessee assents to a lease being granted to another, and relinquishes his own possession to the new lessee, this will operate as a due surrender in contemplation of law.²³⁴

A surrender of demised premises by the tenant and their acceptance by the landlord will, without a written agreement, terminate the tenancy.²³⁵

It is a well settled and reasonable rule of law that a tenant for a certain term or for life who has underlet, has no right to surrender his lease to the prejudice of the sub-tenant.²³⁶ And a tenant holding over under a provision for his continuance from year to year cannot prejudice his sub-tenant or under-tenant by a surrender of the premises to the landlord before the expiration of the year. The sub-tenant becomes, by implied attornment, the tenant of the original lessor.²³⁷

It is the duty of a tenant, as soon as his tenancy expires by its own limitation, to peaceably and quietly surrender the possession of the whole of the demised premises, together with all buildings, fixtures and improvements belonging thereto, to his landlord, or to some one authorized by him to receive them. If he neglects or refuses so to do, even

²³⁴ See the leading case of *Thomas v. Cook*, 2 B. & Ald. 119, and particularly *Amory v. Kannoffsky*, 117 Mass. 351; opinion by Endicott, J.

²³⁵ *Hanham v. Sherman*, 113 Mass.

²³⁶ See *Touch*, 301; *Taylor*, L. T. 111; *Adams v. Goddard*, 48 Me. 212; *Eten v. Luyster*, 60 N. Y. 252; *Brown v. Butler*, 4 Phila. 71.

²³⁷ *Hessel v. Johnson*, Pa. 1888.

though he retains them but for a few days with the intention of removing, the landlord may treat him either as a trespasser, or as a tenant for another year or for a shorter term of the same extent as that which has expired.²³⁸

"Till within a comparatively recent period, it was considered that a tenant could not, in any sense, repudiate his tenancy, even where it existed by parol merely, or from year to year; or that he could not do this without surrendering or abandoning the premises. But it is now settled otherwise in this State, and in the United States Supreme Court. The tenant, by distinct notice to his landlord that he will no longer hold the premises under him, has been regarded here as committing an absolute disseizin, and after that, as holding adverse to the landlord, and unless evicted before the term of the Statute of Limitations expires, he will, by such adverse possession, acquire title in his own right. In *Willison v. Watkins*, 3 Peters, U. S. 48, Mr. Justice Baldwin says: 'Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will, from year to year, he was entitled to no notice to quit before ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them.' This case was professedly followed in two cases in this State,²³⁹ and has been recognized in many others. It is undoubtedly a new doctrine, and adopted here from a regard to the difference in our land tenures, and in our civil and social relations and institutions in many respects, from those in England."²⁴⁰

Much has been said by early English writers on the subject of forfeiture. And such books abound with tedious illustrations of this incident. The learning on this subject is of little importance under the American law, as other remedies may be invoked more in harmony with the interests of both parties.²⁴¹

²³⁸ *Noel v. McCrory*, 7 Coldw. (Tenn.) 623; *Schuyler v. Smith*, 51 N. Y. (6 Sick.) 309; 10 Am. Rep. 609.

²³⁹ *Greene v. Munson*, 9 Vt. 37; *Hall v. Dewey*, 10 Vt. 593.

²⁴⁰ Per Redfield, C. J., in *Sherman v. Champlain Transp. Co.*, 31 Vt. 162, 177 (1858).

²⁴¹ See *Delancey v. Ganong*, 9 N. Y. 19.

Forfeitures are to be strictly construed; and when a lease provides that it shall become forfeited, if any of the payments provided for are not made, a whole payment is meant not a balance on a running account. Wherefore, if a part of a payment be accepted before it is due, no forfeiture is incurred by a failure to pay the remainder.²⁴²

Grounds for forfeiture. It may be assumed, with perfect safety, that all leases, written or parol, contain covenants of some kind. Even if they are not expressed the law implies them; but ordinarily they are set forth *in extenso* in the lease itself, and if the lessee violates these conditions, the lease may be terminated, and the landlord's right of re-entry accrues.²⁴³ The re-entry must be peaceable, or the landlord may renounce the right of re-entry and bring an action of ejectment.²⁴⁴ Forfeitures have never been favored either at law or in equity.²⁴⁵ The reason is obvious. For instance, the lessee for a series of years may have paid his rent with rigid punctuality. Through some inadvertence a monthly payment is overlooked. The covenants of his lease are broken. The landlord asserts his right of re-entry and refuses to take the rent even when tendered. What is the result? The tenant has built up a prosperous business. The expense of removal would be very great, and involve the utter prostration of the business for the time being. All this is inequitable. The landlord is presumptively satisfied with the stipulated rent as a recompense for the property, or he would not have accepted it in the first instance. And hence, he is obliged to show technical precision in all of his attempts at re-entry.²⁴⁶ As covenants and conditions may cover almost any phase of right, a forfeiture may be declared for the breach of any condition the parties have seen fit to insert in the lease. In the majority of instances, perhaps it may be

²⁴² *Westmoreland N. Gas Co. v. Dewitt*, 130 Pa. St. 235.

²⁴³ *Clark v. Jones*, 1 Den. 516; *Walker v. Engler*, 30 Mo. 130.

²⁴⁴ *Van Rensselaer v. Ball*, 19 N. Y. 100; *Campbell v. Shipley*, 41 Md. 81.

²⁴⁵ *Jackson v. Topping*, 1 Wend. 388.

²⁴⁶ *Lewis v. City of St. Louis*, 69 Mo. 595; *Fulton v. Stewart*, 2 Ohio, 215; *Fifty Associates v. Howland*, 11 Met. 99; *Westmoreland & Cambria Gas Co. v. DeWitt*, 130 Pa. St. 255; *McNeil v. Kendall*, 128 Mass. 745.

said, that they involve the breach of some one of the following covenants—failure to pay rent; to keep the premises insured; or to make repairs; or to pay taxes duly assessed, or by using the premises for some other purpose than that for which they were leased. Frequently a forfeiture occurs where the premises become a nuisance or used for an unlawful or immoral purpose. In many States forfeitures are regulated by legislative enactment.²⁴⁷ The old common law abounded in technicalities and niceties that it was a liberal education to learn and a crime to forget, regarding this subject of re-entry on condition broken.²⁴⁸ But much of this nonsense has become obsolete, and in many of the States summary proceedings are in order, by which a landlord can easily obtain possession wherever the tenant has clearly broken the covenants of his lease.

The non-payment of the stipulated rent is not a ground of forfeiture, unless the lease expressly makes it so.²⁴⁹ In order to enforce such a forfeiture, the common law required a formal demand of the rent due to be first made, unless that was waived by an express provision in the lease that it need not be made, or that the landlord might re-enter if the rent was in arrear for a specified time.²⁵⁰ This formal demand was required to be of the exact amount due for the last current quarter or period, and must be made before sunset of the day when it became due, and at the front door of the house or the most notorious place on the demised premises; or, if any other place for payment was specified, at such place.²⁵¹ The strict rules of the common law on this subject have been greatly modified by various statutes, both in England and in this country.

The general rule is that “any act done by a landlord, knowing of a cause of forfeiture by his tenant, affirming the exist-

²⁴⁷ See generally on the subject of Forfeitures, *Eberts v. Fisher*, 54 Mich. 294; *Wheeler v. Earl*, 59 Mass. 31; *Speer v. Fuller*, 8 N. H. 174; *Becker v. Werner*, 98 Pa. St. 555; *Chapman v. Wright*, 20 Ill. 120.

²⁴⁸ See *Jenkins v. Jenkins*, 63 Ind.

²⁴⁹ *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 144.

²⁵⁰ *Doe d. Forster v. Wandlass*, 7 Tenn. 117.

²⁵¹ *Co. Litt.* 202, a; *Jackson v. Harrison*, 17 Johns. 66; *Connor v. Bradley*, 1 How. (U. S.) 211.

ence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture.''²⁵²

An illegal use of demised premises has been held to work a forfeiture.²⁵³

Voluntary waste works a forfeiture of a tenant at will. In New York this forfeiture is confined to so much of the premises as the waste was committed upon.²⁵⁴ A provision in a lease for a re-entry in case of the commission of waste is generally construed to mean waste injurious to the reversion.²⁵⁵

The most common cases of forfeiture are those which arise upon breaches of conditions in leases, for which the landlord is expressly authorized to re-enter. In these cases the landlord, and he alone, has the option to terminate the tenancy, and he can do so only by a re-entry.²⁵⁶

Courts in their solicitude to prevent an unconscionable advantage being taken by either party to an agreement, frequently construe that which has all formalities of a condition—a breach of which forfeits the whole estate—into a covenant upon which, under well recognized rules of law, only the actual damage can be recovered. This is a most effective remedy where grasping avarice seeks to enforce a forfeiture for mere purposes of greed and extortion.²⁵⁷

§ 135. Effect of holding over. The law is too well settled to be disputed at this late day that where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease.²⁵⁸ It is sometimes claimed in all seriousness, that this implication of law may be rebutted and that the tenant did not intend to hold upon the same terms—that in order to make an agreement for another year there must be mutuality of assent, etc. This might appeal strongly to judicial considera-

²⁵² Webster v. Nichols, 104 Ill. 160.

²⁵³ Machias Hotel Co. v. Fisher, 56 Me. 321.

²⁵⁴ London v. Greyme, Cro. Jac. 182; Cole v. Green, 1 Levinz, 309; Jackson v. Tibbitts, 3 Wend. 341.

²⁵⁵ Doe d. Darlington v. Bond, 5 B. & C. 855; 8 D. & R. 738,

²⁵⁶ Shattuck v. Lovejoy, 8 Gray, 204.

²⁵⁷ Avery v. N. Y. C. & H. R. R. Co., 106 N. Y. 142; Hilliard on R. P. 526.

²⁵⁸ Woodf. Land. & Ten. 218; Bradley v. Covel, 4 Cow. 349; Bacon v. Brown, 9. Comm. 334; Hunt v. Wolf, 2 Daily, 298.

tion. The general rule is of wide acceptance that it takes two persons to make a contract. But this rule is not of universal application. We know of very few rules that are. The law is sometimes an important factor in making contracts for parties, and in this phase of a tenancy the law interferes and peremptorily fastens upon the delinquent character of the tenant for another term. He holds over at his peril. If he were allowed to repudiate this relation he might subject his landlord to infinite vexation by way of an action in ejectment or of trespass, and seriously impair his prospects of securing an eligible occupant for the ensuing year.

The mere fact of holding over and continuing the usual stipulated payment of rent raises a presumption that a tenant has elected to hold over for the additional term provided for in the leases. This, like most other presumptions, is subject to rebuttal. But in the absence of the rebutting evidence, it is sufficient to control the case and fasten upon the parties the relation of landlord and tenant for the ensuing term.²⁶⁹

An agreement to reduce the rent, made with a tenant holding over after the expiration of a lease for one year, under which the rent was payable monthly and after payment and acceptance of one additional month's rent is without consideration and will not prevent recovery of the balance of the monthly rent specified in the lease, even after several years further occupancy with payment at the reduced rate.

In *Parjk v. Castle*, 19 How. Pr. 29, Mr. Justice Balcom says: "When a tenant for a year, or for one or more years, holds over after the expiration of his term, without any express agreement, but with the assent of his landlord, the law implies that he holds the premises for another year upon the same terms." Willard in his work on Real Estate, p. 97, cites the case of *Conway v. Starkweather*, 1 Denio, 113, with approval and as an authority for the doctrine therein enunciated. And the learned editor of the eleventh edition of Kent's Commentaries, vol. 4, p. 117, citing this case, in a

²⁶⁹ *Atlantic Bank v. Demmon*, 139 Mass. 420.

note says: "If the landlord elects, as he may, to treat the tenant as holding under the terms of the original lease, the tenant cannot deny the tenancy."

After the expiration of a lease for a year, if the tenant holds over, the law considers him responsible to his landlord as on a hiring for another year, upon the same terms as before.³⁶⁰

The legal presumption of a renewal from the nolding over cannot be rebutted by proof of a contrary intention on the part of the tenant alone.³⁶¹

Having once entered upon the term, it cannot be abandoned except at the end of the year or other term mentioned in the lease.³⁶²

The rule which binds the landlord as well as the tenant is thus stated in Smith, Landlord and Tenant, pp. 219-221: "But, though at the end of the lease, if the tenant holds over he holds over as tenant at sufferance, still, if when the period for payment of rent comes, he pays to his landlord the rent reserved by the expired lease, he becomes tenant from year to year; the payment of such rent by him, and the receipt of it by his landlord being considered indicative of their mutual intention to create a yearly tenancy; the yearly tenancy thus raised is governed, not by the simple rules which govern yearly tenancies in the absence of express stipulation, but by the provisions of the expired lease, so far as they are consistent and compatible with a yearly holding."³⁶³

§ 136. Landlord's remedies on termination of lease. *Forcible entry and detainer as a remedy.*—The statute of forcible entry and detainer, not in terms, but by necessary construc-

³⁶⁰ Hosmer, Ch. J., in *Bacon v. Brown*, *supra*.

³⁶¹ *Clinton Wire Cloth Co v. Gardner*, 99 Ill. 151; *Webster v. Nichols*, 104 Ill. 160.

³⁶² *McKinney v. Peck*, 28 Ill. 174.

³⁶³ *Doe v. Bell*, 5 T. R. 471; *Richardson v. Gifford*, 1 Ad. & L. 52; *Beale v. Sanders*, 3 Bing. N. C. 850; *Fronty v. Wood*, 2 Hill, L. 367; *Brewer v. Knapp*, 1 Pick. 335;

Diller v. Roberts, 13 Serg. & R. 60; 15 Am. Dec. 578; *Bacon v. Brown*, 9 Conn. 334; *Dorrill v. Stevens*, 4 McCord, L. 59; *De Young v. Buchanan*, 10 Gill & J. 149, 32 Am. Dec. 156; *Phillips v. Monges*, 4 Whart. 226; *Conway v. Starkweather*, 1 Denio, 113; *Jackson v. Patterson*, 4 Harr. (Del.) 535; *Harkins v. Pope*, 10 Ala. 493; *Lockwood v. Lockwood*, 22 Conn. 425.

tion, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful it is a trespass, and an action for trespass must necessarily lie. Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property, through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title. He may, however, recover nominal damages in all cases of forcible entry and detainer.²⁶⁴ In an action of this character the immediate right of possession is all that is involved.²⁶⁵ The title is not in issue.²⁶⁶

Exemplary damages may be recovered if the entry²⁶⁷ is effected in a wanton and reckless manner, as public policy

²⁶⁴ Reeder v. Purdy, 41 Ill. 279.

²⁶⁵ Riverside Co. v. Townshend, 120 Ill. 9.

²⁶⁶ Sheehy v. Flaherty, 8 Mont. 365.

²⁶⁷ *Note on Entry.* — Anderson thus defines "entry:" (F. *entrer*; L. *in-trare*, to go into.) As relates to property: The act of actually going upon land, or into a building.

At common law, an assertion of title by going upon the land; or, if that was hazardous, by "making continual claim." (*Innerarity v. Mims*, 1 Ala. 674 (1840).)

Taking possession of lands by the legal owner. (*Guion v. Anderson*, 8 Humph. 306 (147).)

1. An extrajudicial and summary remedy by the legal owner, when another person, who has no right, has previously taken possession of land or tenements.

The party entitled may make a formal but peaceable entry thereon,

declaring that thereby he takes possession, which notorious act of ownership is equivalent to a feudal investiture; or he may enter on any part of the land in the same county in the name of the whole; but if the land lies in different counties he must make different entries. If the claimant is deterred from entering by menaces he may "make claim" as near the estate as he can, with the like forms and solemnities, which claim is in force for a year and a day; and, if repeated once in the like period (called "continual claim"), has the same effect as a legal entry. Such entry puts into immediate possession him that has the right of entry, and thereby makes him complete owner, capable of conveying. But this remedy applies only in cases in which the original entry of the wrong-doer was unlawful, viz., in abatement, intru-

requires the owner to use peaceful means to retain his rights or resort to the courts for protection. Physical violence will not be tolerated.

Except in cases of landlords and of mortgagees, this process has not been extended to try the title or right of possession of lands, in favor of one who has never been in possession. The purpose of the statute is to give a speedy remedy to those whose possession is invaded, and not to take the place of a writ of entry to try the title.²⁶⁸

"Where the entry is lawful, it must not be made with a strong hand, or with a number of assailants; where it is not lawful, it must not be done at all."²⁶⁹ Following the analogy as to riots, three persons have been held enough to support the averment "multitude."

The entire learning on this subject of entry has been deprived largely of its original importance in the law of real property, by reason of the modern tendency to disregard the rules formerly relating to seizin. But entry is still regaining possession of land from a person wrongfully in possession. It must be peaceable and must be made within the period allowed by the Statute of Limitations.²⁷⁰

Re-entry denotes a right reserved by the lessor to regard the lease as forfeited and to assume possession of the prem-

sion, and disseisin. In discontinuance and deforcement the owner of the estate cannot enter; for, the original entry being lawful, an apparent right of possession is gained, and the owner is driven to his action at law. In cases where entries are lawful, the right of entry may be "tolled," that is, taken away, by descent. Corresponds to recaption of personalty. (3 Bl. Com. 174-79, 5; 2 Id. 314.)

Re-entry. The right reserved to consider a lease forfeited and to resume possession of the premises, upon failure in the lessee to perform a covenant; also, any exercise of this right.

This being a harsh power, the

courts will restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. (The Elevator Cases, 17 F. R. 200 (1881).)

When for rent in arrear, unless dispensed with by agreement or statute, demand of payment of the rent must first be made. (Johnston v. Hargrove, 81 Va. 121-23 (1885), cases.)

Cited from Anderson's Law Dict.

²⁶⁸ Boyle v. Boyle, 121 Mass. 85; Woodside v. Ridgeway, 126 Mass. 292.

²⁶⁹ 2 Wharton Crim. Law, 9th ed. 1093.

²⁷⁰ 3 Steph. Comm. 243.

ises by reason of some failure in duty on the part of the lessee. It is also applied to the actual exercise of this right. Our courts have manifested great reluctance in enforcing the rights under a re-entry clause. They usually restrain its exercise to the most technical limits of the conditions named and require in most instances that a demand for payment of the rent in arrears shall first be made unless such a demand has been dispensed with by positive agreement.²⁷¹

Forcible entry and detainer is a term denoting an offense against the public peace and involves the unauthorized taking and keeping possession of lands and tenements of another by force. In this country a civil remedy is provided for by statute through which restitution of the lands entered upon may be had; and the offense is also punishable by indictment. A mere refusal to deliver possession of land when demanded is not a foundation for the process of forcible entry and detainer. There must be some apparent violence, in deed or word, to the person of another, or some circumstances tending to excite terror in the owner, and to prevent him from claiming or maintaining his right.²⁷²

The purpose of statutes forbidding forcible entry and detainer is, that without regarding the actual condition of the title to the property, where a person is in the quiet and peaceable possession of it, he shall not be turned out by strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or may have the better right to the present possession, but the policy of the law is to prevent disturbances of the public peace, to forbid any person righting himself, in a case of that kind, by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been obtained; and that when the parties are in "*statu quo*," in the position they were in before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance.²⁷³

²⁷¹ Johnson v. Hargrove, 81 Va. 121; see also the Elevator cases, 17 Fed. Rep. 200.

²⁷² Comm v. Dudley, 20 Mass. 402.

²⁷³ Iron Mountain R. R. Co. v. Johnson, 118 U. S. 611; per Miller, J.

Forcible entry is accomplished if the wrongdoer displays such violence as evidences an intent to intimidate the party in possession, or deter him from defending or maintaining his rights, or to excite him to repel the invasion, and thus bring about a breach of the peace.²⁷⁴

Both compensatory and punitive damages may be awarded against the transgressor for the injury regardless of the state of the legal title or of the possessory rights.²⁷⁵

In *Curtis v. Galvin*, *infra*, it was held that a tenant at sufferance could not maintain an action against the owner of the premises, who entered upon and expelled him, and removed his furniture

In *Mugford v. Richardson*, 6 Allen, 76, the owner of a tenement entered without objection and removed the windows. The tenant attempted to prevent this and the court held that the landlord was justified in using sufficient force to overcome resistance. In New York it was early determined that if a person having a legal right to enter upon land, enters by force, though liable to indictment, he is not liable to a private action for damages at the suit of the person whom he turns out of possession.²⁷⁶ Well considered English cases support the same conclusion. Thus in *Harvey v. Bridges*, 14 M. & W. 437, Baron Park uses the following language: "I should have no difficulty in saying that when a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, though the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed. For the preservation of the peace the law will furnish forcible entry, but the tenant at sufferance, being himself a wrongdoer, ought not to be heard to complain in a civil action, for that which is the result of his own misconduct."

²⁷⁴ *Ely v. Yore*, 71 Cal. 133.

²⁷⁵ *Ives v. Ives*, 13 Johns. 235.

²⁷⁶ *Denver & Rio Grande R. R.*

Co. v. Harris, 122 U. S. 597.

Where the tenants' occupancy has been legally terminated, they are entitled to a reasonable time in which to remove their goods, after which the landlord may enter and remove them, storing them in a careful manner in some place near by.²⁷⁷ In *Whitney v. Sweet*, 2 Fost. 10, a legal notice to quit was duly given. "This," observes Bell, J., "was a sufficient notice and the tenancy was by that notice terminated. After the day specified therein the tenant becomes a trespasser, his goods are damage feasant, and the owner has a clear and perfect right to go into the house with suitable assistants, and then, peaceably and quietly, without breach of the peace, remove the goods to a near and convenient distance, and there leave them for the use of the owner, doing them no unnecessary damage." This view has been repeatedly sustained by the Supreme Court of Massachusetts in repeated decisions.²⁷⁸ Indeed, after the legal termination of the tenancy the tenant could have no longer any other rights than those of ingress and egress for a reasonable time, to take care of and remove his property.²⁷⁹ By the principles of the common law observes Wilde, J., in *Fifty Associates v. Howland*, 5 Cush. 214, some degree of force is allowed in expelling an intruder into a man's lands or tenements, who refuses to quit although he has no right to the possession. The owner is not justified to use such degree of force as would tend to a breach of the peace, but he is allowed to use such force as would sustain a plea in justification of "*molliter manus imposuit*."

As a result of the authorities under statutes like ours, it may be stated that to make any entry forcible, there must be such acts of violence used or threatened as give reasons to apprehend personal danger in standing in defense of the possession. If there is no more force used than is implied in every trespass, with nothing to excite fear of personal violence, the case is not within the statute; and, therefore, the forcing open of the outer door of the dwelling house, in "a peaceable manner," as stated in the instruction, was not of itself sufficient to constitute a forcible entry, within the meaning of the statute.²⁸⁰

²⁷⁷ *Rollins v. Moores*, 25 Me. 192.

²⁷⁸ *Curtis v. Galvin*, 1 Allen, 215.

²⁷⁹ *Moore v. Boyd*, 24 Mo. 242.

²⁸⁰ 2 Taylor, Land. & T., sect. 884;

2 Woodfall, Land. & T. 787, note; Id. 846; *Frazier v. Hanlon*, 5 Cal.

As to when an entry is made with force, within the meaning of this statute, there is much apparent conflict in the authorities. But the divergence of views sometimes expressed is doubtless in part owing to the different phraseology of the statutes under which the cases have arisen, and the conflict is more apparent than real. It is agreed that the object of the statute is not to punish for a mere trespass upon land. In substance, our statute is the same as the original Forcible Entry and Detainer Act of 5 Rich. II, after which the statutes in most of the States are modelled; the words "not with force," and "not with strong hand or with multitude of people," in substance meaning the same thing. The proceedings under the statute were originally in their nature criminal, for the redress of a wrong to the public done by a breach of the peace. It was not designed or intended to confer rights. While, through gradual additions, the remedy has become in effect private as well as public, its main design still is to prevent breaches of the public peace. In actions under the statute there must still be present, to secure conviction, proof of some wrong done to the public. The process was originally what the expression (taking the word "forcibly" in its technical meaning) meant — a process for the recovery of lands entered or detained by such force as to constitute a breach of the peace. It "was authorized only where the entry or holding was by force or violence, or threats of violence, sufficient to deter the owner from entering."²⁸¹ The word "force," when used in the statute, means actual force, as contradistinguished from implied force; and so it has always been held under the Statute of 5 Rich. II, and similar statutes, not only in England, but by the weight of authority in this country.²⁸² As a general rule, it may be stated that, to render an entry forcible under the Statute of Forcible Entry and Detainer, it "must be accom-

156; *Com. v. Dudley*, 10 Mass. 403; *Gray v. Finch*, 23 Conn. 495; *Hendrickson v. Hendrickson*, 12 N. J. L. 232; *Pennsylvania v. Robison*, Add. Rep. 14-18; *Fort Dearborn Lodge*, No. 214, I. O. O. F., v. *Klein*, 115 Ill. 177, 2 West. Rep.

33; *Shaw v. Hoffman*, 25 Mich. 162; *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442.

²⁸¹ *Kent, J.*, in *Dunning v. Finson*, 46 Me. 560.

²⁸² See note to *Evill v. Conwell*, 2 Blackf. 133, 18 Am. Dec. 138.

panied with circumstances tending to excite terror in the owner, and to prevent him from maintaining his rights. There must be, at least, apparent violence; or some unusual weapons; or the parties attended with an unusual number of people; some menaces or other acts giving reasonable cause to fear that the party making the forcible entry will do some bodily hurt to those in possession if they do not give up the same."²⁸³ An entry which has no other force than such as is implied in every trespass is not within the statute. It must be accompanied with some circumstance of terror or violence to the person, unless the entry is riotous or tumultuous, and endangers the public peace. "A forcible entry," says Tomlins (Law Dict.), "is only such an entry as is made with strong hand, with unusual weapons, an unusual number of servants or attendants, or with menace of life or limb; for an entry which only amounts in law to a trespass is not within the statute." The same view is taken in *Willard v. Warren*, 17 Wend. 257, in which Mr. Justice Cowen, after reviewing the authorities, says: "The result seems to be that there must be something of personal violence, or a tendency to, or threats of personal violence, unless the entry or detainer is riotous." In *Foster v. Kelsey*, 36 Vt. 201; 84 Am. Dec. 676, it is said: "They (Statutes of Forcible Entry and Detainer), are not intended to apply to mere acts of trespass which are not accompanied with violence and do not tend to a breach of the peace. A forcible entry must be accompanied either with actual violence, or with circumstances tending to excite terror, and to intimidate the owner or his servants from maintaining his rights."

Where the landlord entitled to possession enters the premises during the temporary absence of the tenant he is justified in so doing if he does so in a quiet and peaceable manner.²⁸⁴

If necessary to do so a landlord may enter by forcing open an outer door.²⁸⁵

²⁸³ Com. v. Shattuck, 4 Cush. 145.

²⁸⁴ Taylor, Land. & T., sect. 531, 532; Cooley, Torts, p. 323, and note, also see p. 326; Mussey v. Scott, 32 Vt. 82; Sampson v.

Henry, 13 Pick. 36; Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442.

²⁸⁵ Ibid.

When the lease expires the court recognizes the right to remove goods if no unnecessary force was used.²⁸⁶

One class of cases, such as *Ainsworth v. Barry*, 35 Wis. 136; *Steinlein v. Halstead*, 42 Wis. 422; *Warren v. Kelley*, 17 Tex. 544; *Holmes v. Holloway*, 21 Tex. 658, is to the effect that the jury may find the entry to be forcible, when made with strong hand, or with multitude of people, or in a riotous manner, even in the absence of the occupant, and with no personal violence or intimidation towards him. It is manifest that these do not apply here; for plaintiff's entry was not made in any such a way, and, besides, the question was submitted to the jury, and they found the plaintiff entered in a peaceable and orderly manner. Another class of cases cited, such as *Chiles v. Stephens*, 3 A. K. Marsh, 340; and *Brumfield v. Reynolds*, 4 Ky. 388, which seem to have been followed in *Davidson v. Phillips*, 9 Yerg. 93; *Krevet v. Meyer*, 24 Mo. 107; and *Greeley v. Spratt*, 19 Fla. 644, were made under statutes which, by an extension of the provisions of the original Statute of Forcible Entry and Detainer, have forbidden peaceable entries, if against the will of the occupants, and under which restitution will be granted, even to a wrongful occupant, as against an owner entitled to possession, though the latter use no actual force in gaining the possession.²⁸⁷ These authorities can have no application under our statute, which only forbids an entry with force, and authorizes one, if peaceable.

A more particular reference to some of the cases will illustrate the rule and its application by the courts. In *Pike v. Witt*, 104 Mass. 598, the defendants, with a person employed by them as a workman, went to the premises owned by them, but occupied by plaintiff, the doors of which were fastened by an iron clasp and padlock, and demanded the key of plaintiff's servant who was at the premises at the time, the plaintiff not being present, and, on his refusal to deliver the key, ordered their workman to enter the premises through a hole in the floor, and with the aid of an axe, which they brought with them, they removed the padlock, entered, and kept possession; and it was held that this was not a forcible

²⁸⁶ *Overdeer v. Lewis*, 1 Watts & S. 90, 37 Am. Dec. 440.

²⁸⁷ 2 Woodfall, Land. & Ten. 787.

entry, within the meaning of the statute, the court saying the removal of the padlock or bolt "amounted merely to mechanical force, applied against the consent of plaintiff's agent, but not tending to alarm him or to excite apprehensions of bodily harm." And again in *Wood v. Phillips*, 43 N. Y. 152, the plaintiff and defendant were tenants in common of certain real estate, which was in the exclusive possession of defendant. On demand made by plaintiff, the defendant refused to give her possession; whereupon she got in the house through the window, when the house was locked up and unoccupied, took off the locks, and put them on so as to fasten the doors on the inside. She then commenced to occupy it, stayed there through the day, took her meals there, and received her friends there. On the evening of the same day the defendant and other persons went to the house, broke open the door forcibly, and, plaintiff refusing to leave the premises, they took hold of her and put her out. In an action for assault and battery for putting her out, the court held that her possession, thus acquired, was a peaceable and lawful one; the court, through Folger, J., saying: "She (Mrs. King), had the right of possession, and had the right to acquire it in a peaceable manner."²⁸⁸ She did acquire possession by stealth, it is true, but it was without tumult or breach of the peace, and in a peaceable manner, in a way which the law justifies.²⁸⁹ Again, on page 158, speaking of her liability under the Forcible Entry and Detainer Act, he proceeds: "Now, we have already stated that the entry of the plaintiff was, in the eye of the law, an orderly one. Those authorities, then, which hold that proceedings for forcible entry and detainer will lie against the legal owner, come short of upholding the position that the plaintiff, being the legal owner, and having the right of possession, had not the right, by her own act, to acquire possession in an orderly and peaceable way."²⁹⁰ So, in *Mussey v. Scott*, 32 Vt. 82, the plaintiff, having the right of possession of a house occupied by the defendant, while the defendant was temporarily absent for the day only, having fastened

²⁸⁸ *Hyatt v. Wood*, 4 Johns. 150-158.

²⁸⁹ *Ibid.*; *McDougall v. Sitcher*, 1

Johns. 42; 2 Archbold, Crim. Pr. & Pl. (7th Am. ed.) 337.

²⁹⁰ *Willard v. Warren*, 17 Wend. 257.

the house upon leaving, entered the premises by forcing open the door, and placed defendant's furniture in the street, and fastened up the house again and left it. The defendant, on returning, forced open the door, and re-entered and occupied the premises. It was held that plaintiff's entry was the exercise of a legal right in a legal manner, and that he could maintain trespass *quare clausum* against the defendant for his subsequent entry. The court, speaking through Bennett, J., says: "He (defendant) had gone away and left no one in possession, and the house *de facto* was vacant at the time the entry was made by forcing open the door of the house, which the defendant had fastened when he left the house in the morning, and there is no pretense that it was made in a riotous and tumultuous manner, or in such way as would even tend to a breach of the peace. It does seem to us made in a peaceable manner." *Mason v. Powell*, 38 N. J. L. 576, was decided under a statute providing that any entry "with force or with strong hand or with weapons, or by breaking open the doors, windows, or other parts of a house, whether any person be in it or not," is a forcible entry, and therefore is not in point here. What was said by the chief justice about the rule at common law was unnecessary to the decision of the case, and its correctness has been questioned.²⁰¹ The case of *Allen v. Tobias*, 77 Ill. 169, holding that the breaking down and destroying a fence inclosing a vacant lot, under claim of ownership, was a forcible entry, is very much shaken by what was said by Mulkey, Ch. J., in *Fort Dearborn Lodge, No. 214, I. O. O. F., v. Klein*, 115 Ill. 191; 2 West. Rep. 33, to wit: "A person not having a right to enter is forbidden to do so. One having such right may enter, provided he do so without force and in a peaceable manner. The word 'force', as here used, means actual force, as contradistinguished from implied force." And again, on page 192, 115 Ill.: "A peaceable entry in such case (by the owner) as completely defeats the possession and seizin of the occupant as if put in possession by a suit at law. In either case the possession of the occupant is determined and if he does not at once vacate the premises the owner being now in possession, may

²⁰¹ See Mr. Justice Cowen's opinion in *Willard v. Warren*, *supra*.

himself maintain an action of trespass against the tortious occupant; but the owner is not authorized to assault him or forcibly eject him."

Upon an extended survey of the modern decisions, both English and American, it may be stated as a summary, that the owner of real property may recover possession of the premises through the use of such force as the emergencies of the situation may require. He is not allowed to unnecessarily harrass the tenant nor occupant, nor resort to violent measures that may endanger life or limb, but having once gained the possession, reasonable force may be employed in retaining it. And if he enters by force, even though he may be indicted for a breach of the peace, he is not liable to a private action for trespass at the instance of the person who has no right and is turned out of possession.²⁹²

If a claimant of real estate, out of possession, resorts to force, amounting to a breach of the peace, to obtain possession from another claimant, who is in peaceable possession, and personal injury arises therefrom, the party using the force is liable in damages, compensatory and punitive, for the injury, without regard to the legal title, or to the right of possession.²⁹³

And in *Todd v. Jackson*, 26 N. J. L. 525, it was held that, where a tenancy has expired, the landlord may take possession of the premises by any means short of personal violence. "I am willing to lay down the law to be," says the chancellor, on page 532, "that the landlord may take possession by any means short of personal violence; that he may break into the dwelling house for the purpose, because no one ought to complain of him for such an injury done to his own property; that he may remove the goods which he finds there, because they are an unlawful encroachment upon his rights; that, once in possession, he may protect that possession as well against the individual who, in violation of his

²⁹² *Hyatt v. Wood*, 4 Johns. 450; *Beecher v. Parmalee*, 9 Vt. 352; *Harvey v. Brydges*, 14 M. & W. 437; *Krevet v. Meyer*, 24 Mo. 107; *Zell v. Reame*, 31 Pa. St. 304. See for extended discussion the cele-

brated case of *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80.

²⁹³ *Denver & Rio Grande R. Co. v. Harris*, 122 U. S. 597, 605 (1887), Harlan, J.

contract, has attempted to wrong him, as against a stranger who intrudes upon his possession."

In *Fabri v. Bryan*, 80 Ill. 182, this court held that, where a lease contains a license to the landlord to enter in possession of the leased premises without process of law, and expel and remove the tenant, and use such force as may be necessary in doing so, the landlord may enter and remove the tenant after the expiration of the term, and the tenant cannot maintain an action of trespass against the landlord. If, as held, the tenant may make a lawful contract with the landlord, under which the latter may enter and remove the tenant, what principle of law forbids the tenant from incorporating in a lease a provision under which, upon default of surrendering possession at the end of the term, a judgment for possession may be confessed in a court of competent jurisdiction?

After the expiration of the term a *tenant holding over* is regarded as a tenant at sufferance only, without the right of possession as against his landlord. If the latter, in pursuance of his legal rights, enters and expels him he may be indicted for the forcible entry, but he is not liable for damages in an action of tort or for an assault for expelling the tenant, assuming that he uses no more force than is necessary. A legal possession cannot be gained by a forcible entry. It is an indictable offense at common law, and such an entry is prohibited under penalty of restitution of the premises on a summary process, which may be maintained by one who has a bare peaceable possession without title.²⁹⁴ The necessity of a peaceable possession or rather entry, is strenuously insisted upon in several cases where the question has been presented.²⁹⁵ In England the authorities are conflicting. *Harvey v. Brydges*, 14 M. & W. 437, was entirely extrajudicial.²⁹⁶ All that is decided by the comparatively recent case of *Low v. Elwell*, 121 Mass. 309, is that the landlord who ejects without unnecessary force is not liable in an action for assault.

The rule is emphasized that the landlord may obtain pos-

²⁹⁴ Taylor, Land. & Ten. sec. 789; *Dustin v. Cowdrey*, 23 Vt. 631; 4 Am. Law Rev. 429, 448. *Stearns v. Sampson*, 59 Me. 568.

²⁹⁵ *Page v. Dupuy*, 40 Ill. 506; ²⁹⁶ 4 Kent's Com. 118, note (12 ed). *Larkin v. Avery*, 23 Conn. 304;

session by forcible means but must not resort to any more violence than is necessary to make his entry effectual. To hold otherwise would enable a person, occupying land entirely without right, to ignore the lawful owner and compel him to resort to a civil action with all of its attendant delays in order to recover possession of that to which he has a positive right.²⁹⁷

The old common law remedy of distress for rent appears to have been originally adopted in this country, but the legislation of the last fifty years has seriously impaired many of its former incidents. In its statutory form it is still resorted to, but it is falling into great disfavor as it raises an invidious distinction in favor of a privileged class of creditors which has survived similar remedies applicable to other forms of debt. Any decent sense of equity would accord to all creditors, equally entitled to protection, the same remedial rights, and the courts of North Carolina have bluntly declared that the remedy of distress is inimical to the spirit of her laws, and the sense of a just government.²⁹⁸ New York abolished it long ago for similar reasons. And in the New England States it fell into early disrepute before the law of attachment on mesne process had obtained a foothold. The modern process of summary proceedings is both humane and effective, and the remedy has been developed by the New York courts into very favorable notice. Whatever the form of relief may be in vogue in the different States, the intent is in all instances to replace the landlord in possession as expeditiously and peaceably as possible.

As to damages it may be said that where two parties have made a contract which one of them has broken the damages which the other party ought to receive, should include all gains prevented as well as losses sustained and this rule is subject to but two conditions. The damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, that is such as might naturally be expected to follow its violation;

²⁹⁷ See *Jackson v. Farmer*, 9 Wend. 201; *Kellum v. Janson*, 17 Pa. St. 467; *Sterling v. Warden*, 51 N. H. 217.

²⁹⁸ *Youngblood v. Lowry*, 2 McCord, 39.

and they must be certain, both in the nature and respect to the cause from which they proceed.²⁹⁹

§ 137. **Notice to quit.** The rule relative to notices seems to be as follows: Where there is a lease for a certain period, the term determines without notice.³⁰⁰ In uncertain tenancies, reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII, according to Lord Ellenborough, been six months.³⁰¹

This rule was applied to all uncertain tenancies in this State, whether rent was or was not reserved.³⁰² The time was changed to three months by Act of 1840 (Pamph. L, p. 104), now, with a little change in the text, the twenty-seventh section of the Landlord and Tenant Act in the revision.³⁰³

In cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is, that the notice must be regulated by the letting, and must be equivalent to a period.³⁰⁴ How the rule arose is uncertain. It certainly did not have its origin in any resolution of the courts. Indeed, Baron Park, in *Huffel v. Armistead*, 7 C. & P. 56, said that he knew of no decision holding a week's or month's notice was necessary to determine a weekly or monthly tenancy. See, also, the remarks of the judges, to the same import, in *Towne v. Campbell*, 3 C. B. 921.

It seems, however, to have very clearly shaped itself into a custom. The habit of giving and requiring reasonable notice, in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from year to year, was, according to Lord Ellenborough, very early held to be six months, was probably by a custom equally as old, in tenancies for less periods, established as now stated by the books.

By strict relativeness, the rule of a half year's notice in tenancies from year to year, would only require a half

²⁹⁹ *Hadley v. Baxendale*, 9 Ex. 341; *Griffin v. Colver*, 16 N. Y. 489.

³⁰⁰ *Cobb v. Stokes*, 8 East. 358; *Right v. Darby*, 1 Term R. 159; *Decker v. Adams*, 7 Halst. 99.

³⁰¹ *Doe d. Strickland v. Spence*, 6 East. 120.

³⁰² *Den v. Drake*, 2 Green, 523.

³⁰³ Rev. 575.

³⁰⁴ *Taylor, Land. & Ten. sec. 478*; *Archb. Land. & Ten. 87*.

month's or a half week's notice in cases of monthly or weekly tenancies. The briefness of the latter, and the length of the former kind of tenancies, was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognitions of what was obviously a custom, and, as such, the cases would seem to have as much weight as authority as if they had expressly ruled the point.

When a tenant under a demise for a year or more, holds over after the end of his term, without any new agreement with the landlord, he may be treated as a tenant from year to year, and in all other respects as holding upon the terms of the original lease. The landlord has an election to treat him either as a trespasser, or as a tenant. He will be a trespasser if the landlord brings ejectment, or resorts to summary proceedings under the statute to recover the possession. He will be a tenant if the landlord either receives or distrains for rent accruing after the end of the original term. There are also other ways in which the landlord may signify his assent to the tenancy; and when he neither says nor does anything, his acquiescence in the tenancy may, perhaps, be inferred from the mere lapse of time.³⁰⁵

SUMMARY PROCEEDINGS TO RECOVER LAND.

Notice. A notice to authorize summary proceedings against the tenant holding over after the termination of his lease must, either in direct terms or by clear and unmistakable implication, point out a day upon which the tenant is required to quit, which day must be at or after the termination of the lease.³⁰⁶

§ 138. Perpetual or manorial leases. A *perpetual lease* may be created by a grant in fee, reserving an annual rent, or by a lease to continue so long as the tenant shall continue to pay the rent and perform the covenants.³⁰⁷ Unless prohibited by

³⁰⁵ *Rewan v. Lytle*, 11 Wend. 616.

³⁰⁶ *Connell v. Chambers*, 22 Neb.

302.

³⁰⁷ *Folts v. Huntley*, 7 Wend. 210;

Van Rensselaer v. Hays, 19 N. Y. (5 Smith) 68.

statute such leases are valid, and they can be terminated only by the agreement of the parties or by the enforcement of a forfeiture.

In Ohio, by the Act of 1821, they were declared to be real estate as to judgment and execution. By an Act of 1837, they were declared to descend as estates of inheritance. By an Act of 1839, both these were consolidated. Previously, they had been treated as chattels.³⁰⁸ Since they were once adjudged to be real estate for all purposes.³⁰⁹ This is doubted in *Boyd v. Talbert*, 12 Ohio, 212, and the better opinion is that they are so only as to judgments, executions, liens, sales, and descents.³¹⁰

In New York certain purchasers, or, as they were variously called, patentees, patroons, or lords, early obtained from the British sovereigns letters-patent, granting large districts in the central regions of the colony. Some of the proprietors, in a spirit of emulation then deemed harmless and laudable, obtained permission from the Crown to erect manors within these districts, with certain political, judicial, and legislative privileges and advantages, which have long since become obsolete. With reference to those advantages, however, they adopted a system of granting lands, not absolutely by fee simple in deeds, but as qualified estates in fee simple, by instruments which are commonly called leases, whereby the patroon or landlord reserved for his own use all water power and mineral wealth. Perpetual rents were reserved; portions of which were paid in wheat and supplies for the table of the proprietor, and the residue in service or labor, to be performed by the tenants about his manor house. Alienation by the tenants was restrained, unless with the lord's consent, to be obtained by paying to him one-quarter, or some other part of the purchase money. The right to distrain for rent — a severe but not then an unusual remedy — was incorporated in the leases, with stringent covenants for

³⁰⁸ *Bisbee v. Hall*, 3 Ohio, 449; *Reynolds v. Stark County*, 5 Ohio, 204; *Murdock v. Ratcliff*, 7 Ohio, 1 pt. 119.

³⁰⁹ *Loring v. Melendy*, 11 Ohio,

³¹⁰ See *Abbott v. Bosworth*, 36 Ohio St. 605; *Northern Bank v. Roosa*, 13 Ohio, 334; *McLean v. Rocky*, 3 McLean, 235; *Walker*, Am. Law, 329, n.

the payment of taxes and other purposes; and with various conditions securing to the landlord a right to re-enter and resume the land. However unwise for both contracting parties such conveyances may now seem, it ought to be remembered that, at the time of their institution, they were not at all anomalous, and they contributed to the settlement of extensive districts by an industrious population, who had not sufficient capital to become absolute purchasers of estates. The validity of these leases in fee, reserving a perpetual rent, the source of much angry litigation, has been at length definitely settled by the court of last resort, in the case of *Van Rensselaer v. Hays*, 19 N. Y. R. 68.

Perpetual leases are also known as manorial leases and have been held to create a rent charge, rather than a rent service, and while at common law it was said a rent charge could not be apportioned, the New York courts have held that such an apportionment is possible by the concurring assent or acquiescence of both the landlord and tenant.³¹¹ Manorial or perpetual leases, made in 1794, have been held valid. *Lyon v. Odell*, 65 N. Y. 28, presented an action on one of these leases. No rent had been paid for fifty-one years, and the question was whether the law indulged the presumption that all the rights reserved in the lease by the lessor, Van Rensselaer, had been abandoned or extinguished; it was held that there was no such presumption.³¹²

§ 139. Statute of frauds as affecting leases. *Statute of frauds*. — Already have so many cases been taken out of the Statute of Frauds which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of the opinion, that this relaxed construction of the statute ought not to be extended further than it has already been carried.³¹³

One thing must be clearly apprehended regarding these parol leases void under the Statute of Frauds. If the tenant

³¹¹ *Van Rensselaer v. Hays*, 19 N. Y. 76; *Van Rensselaer v. Chadwick*, 22 Id. 34; *Van Rensselaer v. Gallup*, 5 Den. 454; *Church v. Seeley*, 110 N. Y. 457.

³¹² *Bradt v. Church*, 110 N. Y. 537.

³¹³ *Grant v. Naylor*, 4 Cranch. 234.

goes into possession, the conventional relation of landlord and tenant is established, and reciprocal duties at once spring into being. The landlord may resort to the process of distress, or any other remedial measure to collect accruing rents. Nor will the tenant be allowed to deny the landlord's title under the parol lease, unless he can show actual eviction by force of superior title, or that during the pendency of his lease the landlord's title became extinguished.³¹⁴

The Statute of Frauds enacts that all leases, estates, and interests in lands, made without writing, signed by the parties or their agents, lawfully authorized in writing, shall have the force and effect of estates at will only (sec. 1); except leases not exceeding three years from the making, which reserve at least two-thirds of the improved value of the land (sec. 2); and that no lease, estate, or interest shall be assigned, granted or surrendered unless by writing signed by the assignor, grantor, etc., or his agent authorized in writing, except assignments, etc., by operation of law (sec. 3).³¹⁵

Verbal leases that are obnoxious to the Statute of Frauds in some jurisdictions are denied the least effect whatever. In others, they are regarded as sufficient to raise a tenancy at will only. And in either case, it is adjudged that the act of entering into possession by virtue of such a lease, creates a tenancy at will. Payment of rent is what creates the transformation. Where this can be shown, the holding emerges from its unsatisfactory condition as a tenancy at will, and at once assumes all the attributes of an estate from year to year.³¹⁶

It has been assumed, both upon reason and authority, that a parol lease for more than a year is ineffectual to vest any term whatever in the lessee, and that when he goes into possession under it, with the consent of the lessor, and without any further agreement, he is a tenant at will merely, and subject to a liability for rent, on the terms agreed upon in the parol lease as for use and occupation.³¹⁷ The court, in

³¹⁴ Fuller v. Sweet, 30 Mich. 237; Crawford v. Jones, 54 Ala. 459.

³¹⁵ 2 Bl. Com. 297; 2 Whart. Ev. secs. 854-68, 883; Anderson's Law Dict.

³¹⁶ Ruder v. Sayer, 70 N. Y. 184; Laughran v. Smith, 75 Id. 209; Lockwood v. Lockwood, 22 Conn. 425.

³¹⁷ Barlow v. Wainwright, 22 Vt. 88.

other words, implies a new contract from the circumstances surrounding the case, and thus secures justice on the one hand and a satisfaction of the rule on the other. Obviously, the mere entry with consent could not alone justify a presumption to pay, in all cases, and a purpose manifest to accept a portion of the rent provided for in the agreement may, as evidence, go in support of such a new contract.³¹⁸ The rule is established beyond controversy, that when a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease. And the option to so regard it is with the landlord alone — the tenant holds over at his peril.³¹⁹

If the evidence shows the lease was within the Statute of Frauds, and the lessee entered under it, and paid rent for a part of the term, such entry or the possession under such contract will not, in an action at law, take the case out of the operation of the statute.³²⁰ But where a parol lease is made, fixing the amount of rent, and the time of its payment, and fixing the term at a greater period than one year, it is clearly within the Statute of Frauds; and the tenant entering under such voidable contract and paying rent at the sum fixed by the contract becomes a tenant from month to month, and is entitled to notice to quit.³²¹ Being such tenant, and having made payment of rent, and holding over from month to month, he is liable monthly for the rent to be paid by the terms of the contract under which he entered, in the absence of another and different contract.³²² We recognize the rule to be that there can be no distress unless the relation of landlord and tenant exists, and there is a certain fixed rent in money, produce, or services, payable at a certain time.³²³

³¹⁸ *Huntington v. Parkhurst*, 87 Mich. 38; *Morrill v. Mackman*, 24 Id. 279.

³¹⁹ *Tolle v. Orth*, 75 Ind. 298; *Clinton v. Gardner*, 99 Ill. 151; *Scott v. Beecher*, 91 Mich. 591.

³²⁰ *Wheeler v. Frankenthal*, 78 Ill. 124; *Warner v. Hale*, 65 Id. 395; *Chicago Attachment Co. v. Davis Sewing Machine Co.* 142 Id. 171, 15 L. R. A. 754.

³²¹ *Prickett v. Ritter*, 16 Ill. 96; *Warner v. Hale*, *supra*.

³²² *Prickett v. Ritter*, *supra*; *McKinney v. Peck*, 28 Ill. 174; *Brownell v. Welch*, 91 Id. 523; *Creighton v. Sanders*, 89 Id. 543.

³²³ *Valentine v. Jackson*, 9 Wend. 302; *Hatfield v. Fullerton*, 24 Ill. 278; *Johnson v. Prussing*, 4 Ill. App. 575; *Taylor, Land. & Ten. sec. 561*.

The rule of law having been established that, where a parol contract within the statute is made, and possession taken under it, and payments of rent made thereunder, a tenancy from month to month is created, the policy of the statute is satisfied in preventing any person being charged in a contract creating an interest in lands for a longer period than one year by an oral contract, and having created the relation of landlord and tenant, the contract, as far as stipulations are made, not within the statute, governs the parties as long as possession is retained, and the tenant has an interest from month to month, and is regulated in every respect by the terms of the lease except as to the term; and the proof of the contract is sufficient proof of the amount of rental per month and time of payment.³²⁴ Rent being, by the terms of the parol letting, which regulated the amount and time of payment of rent, the landlord has a right to distrain.³²⁵

In *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. 171; 15 L. R. A. 754, it was said: "In *Warner v. Hale*, *supra*, where suit was brought to recover rent on a verbal contract leasing a dock for a term of more than one year, and the Statute of Frauds was pleaded and relied upon as a defense, we held that the facts that appellee was let into possession of the premises under the contract, and occupied them a while, and paid rent pursuant to the verbal contract, did not take the case out of the statute, and that there could, therefore, be no recovery under the contract, and that the only remedy of the lessor was under a *quantum meruit* for use and occupation."

A parol lease of real estate for the term of one year to commence *in futuro*, is invalid, being an agreement which by its terms is not to be performed within one year from the making thereof.³²⁶ The States that have held that an oral

³²⁴ Doe v. Bell, 5 T. R. 471; Richardson v. Gifford, 1 Ad. & El. 52; Schuyler v. Leggett, 2 Cow. 660; People v. Rickert, 8 Id. 226; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79; Laughran v. Smith, 75 N. Y. 205; 1 Greenl. Cruise. 246; Browne, Stat. Fr. sec. 39.

³²⁵ Schuyler v. Leggett, *supra*.

³²⁶ Jellet v. Rhode, Minn. 1890; Wheeler v. Frankenthal, 78 Ill. 124; Hawley v. Moody, 24 Vt. 603; Parker v. Hollis, 50 Ala. 411; Wolf v. Dozer, 22 Kan. 436; Atwood v. Norton, 31 Ga. 507.

lease for one year to begin *in futuro* was valid may be divided into two classes dependent upon differences existing in their respective statutes. In the first class are Indiana, Maryland and New Jersey. In these States oral leases for a period not exceeding three years are valid.³²⁷ In the second class are New York, Michigan and Wisconsin.³²⁸

When the lease is void by reason of the provisions of the statute, that does not render the contract an illegal or unlawful one, if the parties choose to perform it. If the lease is verbal, and the term is for a longer time than one year, it is void in the sense that neither party can compel the other to perform it. The landlord need not, in such a case, give the tenant possession of the premises, if he chooses not to do so, and no action will lie by the tenant for the refusal. So, on the other hand, the tenant may refuse to accept the possession of the premises, and no action will lie by the landlord against the tenant in consequence thereof. The parties may, however, go on and perform the agreement, although they could not be compelled to do so. And in such case, if the tenant goes into possession of the demised premises and occupies them, he will then be bound to perform the agreement, by paying the rent agreed, for such time as he may remain in possession, in the same manner as though the lease had been reduced to writing.³²⁹ And during the time which the tenant occupies the premises under the terms of such parol agreement, he will be bound to perform the terms of it on his own part.³³⁰

§ 140. Principles of eviction examined. a. *The term defined.* In *Upton v. Townsend*, 17 C. B. 30, Jervis, Ld. Ch. J., says: "It is extremely difficult at the present day to define with technical accuracy what is an eviction. The word 'eviction' was formerly used to denote an expulsion by the assertion of a paramount title and by process of law. But that sort of eviction is not necessary to constitute a suspension of the

³²⁷ *Huffman v. Starks*, 31 Ind. 474; *Union B. Co. v. Gittings*, 45 Md. 18; *Birckhead v. Cummins*, 33 N. J. L. 44.

³²⁸ *Becar v. Flews*, 64 N. Y. 518; *Whiting v. Olert*, 52 Mich. 462.

³²⁹ *Schuyler v. Leggett*, 2 Cow. 660; 1 Wait's Law & Pr. 645.

³³⁰ *Id.*

rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended." In *Hoeveler v. Fleming*, 91 Pa. 322, the Supreme Court of the State of Pennsylvania, speaking by Mr. Justice Paxson, says: "The modern doctrine as to what constitutes an eviction is that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law. Thus in *Doran v. Chase*, 2 W. N. C. 609, this court affirmed the ruling of the court below, that 'a landlord's refusal to allow an undertenant to enter the premises, under threats of suit, whereby the lessee is deprived of under letting, is such an interruption of the latter's rights as amounts to an eviction.' So an eviction of the lessee from any part of the demised premises will suspend accruing rent."³³¹ If the landlord claim and use certain privileges upon the demised premises, against the tenant's consent, he must show a reservation of them, or the rent is suspended.³³² And I apprehend there might be a legal eviction by confining the tenant to the demised premises, as by closing up a way which was his only means of egress and ingress. Any act of the landlord which deprives the tenant of that beneficial enjoyment of the premises to which he is entitled under the lease will amount in law to an eviction, and suspend the rent."

Eviction is a popular term for ousting a tenant from the possession of real property either by re-entry or by legal proceedings such as an action of ejectment. The term eludes technical accuracy of definition and is frequently referred to as 1, "actual;" 2, "constructive" and 3, "total." Eviction from all parts of the premises suspends the entire rent for the time being. The tenancy is not thereby ended, but the rent and all remedy for its collection is thereby suspended. To have the effect of suspending the rent the eviction must be effected before the rent becomes due, for rent already overdue is not forfeited. The rule is the same although the rent is payable in advance and the eviction occurs before the expiration of

³³¹ *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691.

³³² *Vaughan v. Blanchard*, 4 U. S. (4 Dall.) 124, 1 L. ed. 769.

the period in which the rent claimed accrues.³³³ It should be added that the covenants for seizin in fee simple and for good right to convey generally inserted by conveyancers are nothing more in legal effect, that covenants against eviction differing in this respect from the familiar covenant for quiet enjoyment.³³⁴ The idea is now abandoned that the ouster³³⁵ must be by due process of law. The present rule simply holds that covenants of warranty and for quiet enjoyment are broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible title. And it is abundantly settled that the eviction may be "constructive" — as when caused by the inability of the purchaser to gain possession by reason of the paramount title.³³⁶

b. *Classified as actual or constructive — total or partial.* Eviction from land may be either actual or constructive. It is the former when the vendee or lessee is expelled from, or deprived of the actual possession by process of law, consequent upon a judgment, or by the exercise of the common law right of entry, or when he voluntarily but actually abandons possession, and surrenders to an adverse title asserted against him.³³⁷

It is a constructive eviction when such grantee or lessee, being entitled to be put in possession under his deed or lease, has never had it, nor been able to obtain it, by reason of a paramount adverse title; or when he accepts a lease or other conveyance under an adverse claimant, either before or after a judgment establishing the title of such claimant, and remains in possession, as he may lawfully do if such title is

³³³ Hunter v. Reiley, 43 N. J. L. 482; 3 Kent, 464.

³³⁴ Child v. Stenning, 11 Ch. Div. 82.

³³⁵ Ouster simply imports a disposssession. Entry upon another's land, if made under color of title, is an ouster, as it is an exclusion of the owner from the enjoyment of the realty. In legal contemplation it is accompanied with an intention to remain in occupancy of the land or building, otherwise it is a

mere trespass. The intention fixes the true character of the entry. (Bath v. Valder, 70 Cal. 357; Ewing v. Bennett, 11 Pet. 52; Newell v. Woodruff, 30 Con. 497.) Generally it may be affirmed that to "oust" a person from land is to take the possession from him so as to deprive him of the freehold. (Co. Litt. 181, a.)

³³⁶ Fritz v. Pusey, 31 Minn. 370.

³³⁷ Rawle's Covenants for Title, 241.

in fact paramount; or when the eviction is not of the land itself, but of something which represents the land, or of some incident to its enjoyment.³³⁸

Eviction may be total or partial. It is total when the possessor is wholly deprived of his rights in the whole thing; partial when he is deprived of only a portion of the thing; as, if he had fifty acres of land, and a third person recovers by a better title twenty-five; or, of some right in relation to the thing; as, if a stranger should claim and establish a right to some easement over the same. When the grantee suffers a total eviction, and he has a covenant of seizin, he recovers from the seller, the consideration money, with interest and costs, and no more. The grantor has no concern with the future rise or fall of the property, nor with the improvements made by the purchaser. This seems to be the general rule in the United States.³³⁹ In Massachusetts the measure of damages on a covenant of warranty is the value of the land at the time of eviction.³⁴⁰

When the eviction is only partial, the damages to be recovered under the covenant of seizin, are a ratable part of the original price, and they are to bear the same ratio to the whole consideration, that the value of land to which the title has failed, bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to the whole consideration money.³⁴¹

c. *What constitutes—special acts of.* To constitute an eviction, such as will result in a suspension of rent, there must be some positively aggressive act such as an actual expulsion of the tenant, or some act of a permanent character deliberately done for the purpose of depriving the tenant of the due enjoyment of the demised premises to which the tenant yields within a reasonable time. As to what is reasonable time depends upon the facts and circumstances surrounding each particular case.³⁴²

³³⁸ Rawle's Covenants for Title, 241.

³³⁹ 3 Caines' R. 111; 4 Johns. R. 1; 13 Id. 50; 4 Dall. R. 441; Cooke's Tenn. R. 447; 1 Harr. & Munf. 202; 5 Munf. R. 415; 4 Halst. R. 139; 2 Bibb. R. 272.

³⁴⁰ 3 Mass. R. 523; 4 Id. 108; see as to other States, 1 Bay. R. 19, 265; 3 Des. Eq. R. 245; 2 Const. R. 584; 2 McCord's R. 413; 3 Call's R. 326.

³⁴¹ Bouvier's Law Dict.

³⁴² Bartlett v. Farrington, 120 Mass. 284.

No general principle is better settled or more uniformly adhered to than that there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of the rent. The cases are collected and well considered by Mr. Justice Kennedy, in *Bennett v. Bittle and Another*, 4 Rawle, 339, and they establish the proposition stated beyond all manner of doubt. It would be a work of supererogation to go over them again, after the full and satisfactory review there taken. *Dyett v. Pendleton*, 8 Cow. 727, decided in the New York Court for the Correction of Errors, shows only an application of the doctrine to an extreme case. That adjudication is not to be regarded as introducing a new principle, nor as establishing an exception to the general rule. There, the grossly lewd and immoral conduct of the landlord in the adjoining premises (another part of the same dwelling) was so offensive to common decency, and accompanied with such riotous and outrageous disturbances, as effectually to destroy the quiet occupation and beneficial enjoyment of the demised tenement, and render it uninhabitable by respectable people. This was considered such a disturbance and destruction of the reasonable use and occupation of the premises, as amounted to a virtual expulsion of the tenant.

In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion. Acts of grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenants of the enjoyment of the demised premises, will constitute an eviction.³⁴³ If the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent, if he continues to occupy the premises. Unless he abandons the premises, his obligation to pay the rent remains.³⁴⁴ As said in *Chicago Legal News Co. v. Browne*, 103 Ill. 317: "The rule is well settled that the wrongful act of the landlord does not bar him from a recovery of rent, unless the tenant by such act

³⁴³ Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124.

³⁴⁴ Skally v. Shute, 132 Mass. 367.

has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless."³⁴⁵ To "evict" a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises, after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises; hence it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right.³⁴⁶

But though the tenant will not be allowed to plead eviction as a bar to the recovery of rent where he has remained in possession after the performance of the acts which would have justified him in leaving the premises, yet he is not for that reason without remedy.

In those States where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained

³⁴⁵ *Edgerton v. Page*, 20 N. Y. 284; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Leadbeater v. Roth*, 25 Ill. 587.

³⁴⁶ *Edgerton v. Page*, *supra*; *Bo-reel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *DeWitt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Warren v. Wagner*, 75 Ala. 188, 51 Am.

Rep. 446; *Wright v. Lattin*, 38 Ill. 293; 1 Taylor, *Land. & Ten.* (8th ed.) secs. 380, 381, and notes; *Wood, Land. & Ten.* (2d ed.) sec. 477, 1104-1106; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117; *Scott v. Simmonds*, 54 N. H. 426; *Jackson v. Eddy*, 12 Mo. 209.

by reason of the acts of the landlord, against the rent sought to be recovered.³⁴⁷ Taylor, in his work on Landlord and Tenant (sec. 631), says: "By the law of recoupment, as now established in many of the United States, the tenant can avail himself as a defense *pro tanto* to an action of debt for rent, of the landlord's breach of his covenants." The doctrine of recoupment is recognized in this State, and has been applied in proceedings begun by the issuance of distress warrants, and in actions for rent.³⁴⁸ In *Lynch v. Baldwin*, *supra*, where the landlord had issued a distress warrant, *held*, "As to recouping damages for any loss or injury sustained by the tenant, we have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value." In *Pepper v. Rowley*, *supra*, which was an action to recover rent due under a lease, *held*, "If there has been a breach of any covenant contained in the lease, whatever damages appellee has sustained in consequence thereof may be recouped in this action from the amount of rent due under the lease."

It has been argued that even the erection of a building by the landlord upon adjoining land would be an eviction, if it stopped the tenant's windows, under the ruling in *Dyett v. Pendleton*, 8 Cow. 727. In that case the New York Court of Errors held that the creation of a nuisance by the landlord in another tenement under the same roof, by bringing lewd women into it, who made a great noise and disturbance there at night, in consequence of which the lessee and his family left the demised premises, was evidence to go to the jury under a plea of eviction. Upon that case it is to be observed 1st, The act of the landlord was an unlawful act, and not a lawful use of his other tenement; 2d, The decision of the Court of Errors was not that the facts in law amounted to an eviction, but only that they should have been submitted to

³⁴⁷ Taylor, Land. & Ten. sec. 631;
2 Wood, Land. & Ten. sec. 477,
1107; Edgerton v. Page, and War-
ren v. Wagner, *supra*.

³⁴⁸ Wright v. Lattin, *supra*; Lind-
ley v. Miller, 67 Ill. 244; Lynch v.
Baldwin, 69 Id. 210; Pepper v.
Rowley, 73 Id. 262.

the jury; 3d, That decision reversed the unanimous judgment of the Supreme Court, as reported in 4 Cow. 581; 4th, It has since been considered, even in New York, an extreme case.³⁴⁹ In *Palmer v. Wetmore*, 2 Sandf. 316, the Superior Court of the city of New York, consisting of Chief Justice Oakley and Justices Vanderpoel and Sandford, adjudged that the mere fact of the erection of a building by a landlord on his adjoining land, so as to obstruct and darken the tenant's windows, was not an eviction. To the same effect is *Myers v. Gemmel*, 10 Barb. 537. See, also, the learned opinion of Judge Daly in *Edgerton v. Page*, 1 Hilt. 320; s. c. 20 N. Y. 281.

d. *Summary of the New York adjudications.* The adjudications in New York are summed up in *Johnson v. Oppenheim*, 12 Abb. Pr. N. S. 449, as follows:

"1, Cases where the tenant is evicted, without the willful or voluntary agency of the landlord, from the whole or some part of the demised premises, as for example, an eviction of the tenant by title paramount of a contiguous proprietor. Here, if the eviction is from the whole premises, the tenant is not chargeable with rent; but if it be from a part of the premises, the law in its inability to impute blame to the landlord for the act of another person, requires the rent to be apportioned, so that the tenant shall be liable to pay for such portions of the premises as he retains.³⁵⁰

"2, Cases where the landlord commits an act or acts of trespass, which interfere, more or less, with the beneficial enjoyment of the premises, but which leave the demised premises intact, and do not deprive the tenant of any part of them, so that though he may be injured, he is not thereby dispossessed. Here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, that such trespass is no defense against the liability for rent, and the tenant's sole remedy therefore is an action for damages against the wrongdoer.³⁵¹

³⁴⁹ *Savage, C. J.*, in *Etheridge v. Osborn*, 12 Wend. 529, 532; *Nelson, C. J.*, in *Ogilvie v. Hull*, 5 Hill, 52, 54; *Bronson, C. J.*, in *Gilhooley v. Washington*, 4 Comst. 217, 219.

³⁵⁰ *Moffat v. Strong*, 9 Bosw. 57; and see *Mack v. Patchen*, 29 How. Pr. 20, 1 Am. Rep. 506.

³⁵¹ *Edgerton v. Page*, 20 N. Y. 281; *Lounsbury v. Snyder*, 31 N.

"3, Cases where the landlord enters wilfully upon and expels the tenant, actually or constructively, from a part of the demised premises. Here the rule is, that the whole rent is suspended during the term, though the tenant continues in possession of the residue."³⁵²

e. *Partial evictions under title paramount by eminent domain.* Eviction by title paramount from a part of the premises is a bar *pro tanto* only, the rent being apportionable.³⁵³

But partial eviction by the landlord's vendee with his consent is the act of the landlord and bars any claim for rent.³⁵⁴

As a partial eviction of the tenant from the premises demised under title paramount is no release from the obligation to pay rent it is equally true that a partial eviction by eminent domain will not constitute a breach of the leasehold covenants and will not exempt the tenant from the obligation to pay rent.³⁵⁵

In *Foot v. Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737, where the leased premises had been appropriated for a street, the Supreme Court held that the lessee was not released from the payment of rent, but he was entitled to recover from the city for the damages sustained. See, also, the following cases, where the same principle is announced: *Workman v. Mifflin*, 30 Pa. 32; *Frost v. Earnest*, 4 Whart. 86; *Chicago v. Garrity*, 7 Ill. App. 474.

For the rule adopted in Missouri see *Biddle v. Hussman*, 23 Mo. 597; *Barclay v. Pickles*, 38 Mo. 143. In those cases it was held that, as to the part of the leased premises appropriated to public use, the rent was extinguished, and no liability existed against the lessee for such rents.

The Supreme Court of Illinois has refused to sanction the

Y. 514; *Cram v. Dresser*, 2 Sandf. 120; *Mortimer v. Brunner*, 6 Bosw. 653; *Peck v. Hiler*, 31 Barb. 117.

³⁵² *Christopher v. Austin*, 11 N. Y. 216; *Peck v. Hiler*, 24 Barb. 178.

³⁵³ *Fillebrown v. Hoar*, 124 Mass. 580; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Poston v. Jones*, 37 N. C. 350, 38 Am. Dec. 683.

³⁵⁴ *Halligan v. Wade*, *supra*.

³⁵⁵ *Schilling v. Holmes*, 23 Cal. 330; *Parks v. Boston*, 15 Pick. 198; *Wagner v. White*, 4 Harr. & J. 564; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Folts v. Huntley*, 7 Wend. 210; *Peck v. Jones*, 70 Pa. 85; *Dyer v. Wightman*, 66 Pa. 427.

rule above stated, and holds the decisions last cited to be against the weight of authority.³⁵⁶

Statutory provision for apportionment of rent, where part of the leased premises are taken by eminent domain, may be waived by the parties.³⁵⁷

f. *Effect of.* It is settled by a current of authority that an eviction of a tenant by the landlord of demised premises suspends the rent. The reason of this rule is well stated by Baron Gilbert in his *Treatise on Rents*, at page 145: "A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this: that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not. If, therefore, the tenant be deprived of the thing letten, the obligation to pay rent ceases, because such obligation has its force only from the consideration, which was the enjoyment of the thing demised."

The modern doctrine as to what constitutes an eviction is, that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law. Thus in *Doran v. Chase*, 2 W. N. C. 609, the court affirmed the ruling of the court below, saying that "A landlord's refusal to allow an under tenant to enter the premises, under threats of suit, whereby the lessee is deprived of underletting, is such an interruption of the latter's rights as amounts to an eviction." So an eviction of the lessee from any part of the demised premises will suspend accruing rent.³⁵⁸ If the landlord claim and use certain privileges upon the demised premises, against the tenant's consent, he must show a reservation of them, or the rent is suspended.³⁵⁹ And I apprehend there might be a legal eviction by confining the tenant to the demised premises, as by closing up a way which was his only means of egress and ingress. Any act of the landlord which deprives the tenant of that beneficial enjoyment of the premises to

³⁵⁶ *Stubbings v. Evanston*, 11 L. R. A. 839, note, 136 Ill. 37.

³⁵⁷ *Phyfe v. Eimer*, 45 N. Y. 102.

³⁵⁸ *Linton v. Hart*, 1 Casey, 193.

³⁵⁹ *Vaughan v. Blanchard*, 4 Dall.

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which he is entitled under the lease, will amount in law to an eviction and suspend rent.

How far the entry of the landlord to make repairs will work an eviction must depend, to some extent, upon the circumstances of each particular case. When the landlord is bound by the lease to make repairs, and the repairs are merely such as are required by ordinary wear and tear, no difficulty is likely to arise. And where he is not bound to do so, but makes them for the benefit of the property and the convenience of the tenant, the dangers of a contest are equally remote, as tenants are more willing, as a general rule, to have the property put in order than landlords are to incur the expenditure. In *Pier v. Carr*, 19 P. F. Smith, 326, where the tenant had been sold out by a constable, under a warrant for taxes, and after the sale, the constable had delivered the key to the landlord, who put a bill "to let" upon the premises, and proceeded to have some slight repairs made, it was held there was no eviction.

The rule has long been settled, that a wrongful eviction of the tenant by the landlord, from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored.³⁶⁰ Whether this eviction must be actual by the forcible removal of the tenant by the landlord from the demised premises or a portion thereof, was not settled in this State until the case of *Dyett v. Pendleton*, 8 Cow. 728. In that case, the principle was established by the Court for the Correction of Errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case, this has been considered as a settled rule of law binding upon all the courts of the State. Such act of the lessor, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with

³⁶⁰ *Christopher v. Austin*, 1 Kern. 217.

an actual expulsion, bars the recovery of rent. The reason of the rule is, that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord; and thus the consideration of his agreement to pay rent has failed. In case of eviction from a portion of the premises, the law will not apportion the rent in favor of the wrongdoer.

In a case where rooms beneath the demised premises were occupied by another tenant of the same landlord, who was of notoriously bad character, and who used them for the purposes of prostitution, causing great disturbance of the tenant above, but there was no evidence that the landlord let such rooms for the purpose of being so used as to disturb that tenant, or that he knew of their being put to such use, or that any evidence thereof was given him, that fact alone was held not to constitute a defense to an action for rent.³⁶¹

Where a tenant is *evicted* from a material portion of demised premises he may exercise his option of either treating it as an eviction from the entire property in which event he may wholly abandon his lease and so absolve himself from all liability for rent due after the eviction, or he may remain in the occupancy of the remainder of the premises and maintain an action against the lessor, for a breach of the covenant for quiet enjoyment.³⁶²

Eviction from the demised premises by the landlord suspends the payment of the rent during the period of continuance of the eviction and in *Leishman v. White*, 1 Allen, 489, it was distinctly held that eviction from a portion of a leasehold relieved the tenant from any payment of the stipulated rent on the ground that the landlord should not be allowed to so apportion his own wrong as to compel the lessee to pay anything for the residue. This decision is in full accord with numerous English decisions on the subject.³⁶³

³⁶¹ DeWitt v. Pierson, 112 Mass. 489; Christopher v. Austin, 1 Kern. 8; S. C. 17 Am. Rep. 58. 216.

³⁶² Morrison v. Chadwick, 7 C. B. ³⁶³ See Upton v. Townsend, 17 C. 266; Leishman v. White, 1 Allen, B. 30.

COVENANT OF TITLE EVICTION.

g. Remedies on covenant. There are some dicta in the early cases to the effect that there must be an eviction by process of law to warrant an action for breach of covenant for quiet enjoyment. The true rule deduced from the modern authorities is to the effect that there must be an actual disturbance of the possession; and where the covenantee is rightfully out of possession, either by legal process or lawful entry of the real owner, or by an enforced surrender by the covenantee to one holding the title paramount, there is in legal contemplation such an eviction as will sustain an action for breach of covenant. But to constitute an eviction it is necessary that there should be an actual dispossession of the grantee. If the superior title is asserted in such an aggressive manner as to leave practically no choice in the covenantee, in other words, in such a way that he is per force, obliged to yield to its superior equities, he is at liberty to purchase or lease of the true owner as he is no longer a claimant under the former title, so far as that title is concerned, he has been evicted and has become a lessee or grantee under the paramount title.³⁶⁴

There are many well reasoned cases that hold that where an eviction, without process of law, is shown, there is a breach of the covenant of quiet enjoyment, as in the case where the true owner at common law had the right to enter without suit, and where the covenantee was never able to obtain possession of the granted premises, which were in possession of the owner of the paramount title. The case of *Waldron v. McCarty*, 3 Johns. 471, as understood, is contrary to the doctrine laid down in *Greenvault v. Davis*, 4 Hill, 643. In that case Mr. Justice Bronson says: "There are some dicta in the books that there must be an eviction by process of law, but I have met with no case where it was so adjudged." And again, "Upon principle, I can see no reason for requiring an eviction by legal process. Whenever the grantee is ousted of possession by one having a

³⁶⁴ See Sugden on Vendors, 745, 586; Funk v. Creswell, 5 Clark, 86; and note; Greenvault v. Davis, 4 Brady v. Spurck, 27 Ill. 478; Stewart v. Drake, 4 Halst. 139; Rawle H. 74; Sprague v. Baker, 17 Mass. on Covenants, 278.

lawful right to the property paramount to the title of the grantor, the covenants of warranty and for quiet enjoyment are broken and the grantee may sue."

"When the grantee surrenders or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor. But there is no reason why such surrender, without the trouble and expense of a law suit, should deprive him of the remedy on the covenant. The grantor is not injured by such an amicable ouster. On the contrary, it is a benefit to him, for he thus saves the expense of an action against the grantee to recover the possession."

h. *Measure of damages.* The measure of damages awarded in an action for breach of covenant of title, after eviction shown is—in the case of a grantee—the purchase money and interest; but where the covenantee has purchased or bought in the superior title it is the amount of the purchase price together with the amount of his disbursements in defending his possession provided such sum shall not exceed the purchase money and interest. This is the well settled rule in *McGary v. Hastings*, 39 Cal. 360.

While there is some fluctuation in the decisions as to the proper measure of damages, generally there is much force given to the rule that the consideration paid should be considered as controlling in such cases.³⁶⁵ This rule is sanctioned by the Supreme Court of the United States.³⁶⁶ As between lessor and lessee the measure of damages is the value of the unexpired term.³⁶⁷

In cases of an *eviction*, on a covenant of seizin and warranty, the rule seems to be to allow the consideration money, with interest and costs.³⁶⁸ But in Massachusetts, on the covenant of warranty, the measure of damages is the value of the land at the time of eviction.³⁶⁹

³⁶⁵ *Bender v. Fromberger*, 4 Dall. 441.

³⁶⁶ See *Lanigan v. Kille*, 97 Pa. St. 120.

³⁶⁷ *Mack v. Patchen*, 42 N. Y. 167; and see *Clarkson v. Skidmaor*, 46 N. Y. 297, opinion by Rapallo, which exhausts the subject.

³⁶⁸ 6 Watts & Serg. 527; 2 Dev. R. 30; 3 Brev. R. 458; see 7 Shepl. 260; 4 Dev. 46.

³⁶⁹ 4 Kent's Com. 462, 3, and the cases there cited; 3 Mass. 523; 4 Id. 108; 1 Bay. 19,265; 3 Des. Eq. R. 247; 4 Penn. St. R. 168.

§ 141. **Leasing "on shares."** I merely conform to general usage by inserting this subdivision in this particular place. The authorities are conflicting, but, in my opinion, the better reasoned cases hold that agreements of this character—and they are very common—do not constitute the conventional relation of landlord and tenant, but rather as between the cropper and the landlord, the relation is that of tenancy in common.³⁷⁰

Opposing these authorities are others holding that the relation between landlord and cropper is, in legal effect, the relation of landlord and tenant.³⁷¹ We do not care to intrude upon this controversy any further than by expressing our preference for the first named view. And the subject will accordingly receive due expansion in the chapter on Joint Tenancy.

§ 142. **Letting on shares.** One to whom land is let to be cultivated on shares, has an interest in the premises; he is not a mere servant of his lessor.³⁷² A tenancy from year to year cannot grow out of such an occupancy, though it may out of an occupancy under a parol lease for more than a year.³⁷³

A cropper then is one who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor.³⁷⁴

Working land on shares—right to crops. An agreement to allow one to work land on shares for a single crop is no lease of the land, but the parties to such an agreement become tenants in common of the crop. They acquire a joint property in the growing crop, and may unite in an action of trespass *de bonis* for cutting it away.³⁷⁵ In *Green v. Armstrong*, 1 Denio, 554, numerous cases are cited to show that growing

³⁷⁰ Demott v. Hagerman, 8 Cow. 220; Bradish v. Schenck, 8 Johns. 152; Harris v. Frink, 49 N. Y. 24; Guest v. Opdyke, 31 N. J. L. 554; Williams v. Nolan, 34 Ala. 167; Wilbur v. Sisson, 54 N. Y. 121.

³⁷¹ Brown v. Jaquette, 94 Pa. St. 113; Allwood v. Ruckman, 21 Ill. 200; Woodruff v. Adams, 5 Blackf. 317; Warner v. Abbey, 112 Mass. 355; Walls v. Preston, 25 Cal. 59.

³⁷² Putnam v. Wise, 1 Hill; Harrower v. Heat, 19 Barb. 331; Wilber v. Sisson, 54 N. Y. 121; Reynolds v. Reynolds, 48 Hun, 142; Taylor v. Bradley, 39 N. Y. 129.

³⁷³ Unglish v. Marvin, 128 N. Y. 380; Conder v. Cohn, 118 Id. 309; Loughran v. Smith, 75 Id. 205; Reider v. Sayer, 70 Id. 180.

³⁷⁴ 2 Rawle, R. 12.

³⁷⁵ Harris v. Frink, 49 N. Y. 24.

crops, which are the produce of manual labor and cultivation, may be conveyed by verbal contract as goods and chattels and sold on execution, and that trover may be maintained for them against one in possession of the land.³⁷⁶ And it has been held in Pennsylvania that they may be mortgaged by one out of possession of the premises.³⁷⁷

The occupancy of a house by a farm hand and his family who are hired to do work connected with the farm for a certain price per day and the use of the house to live in, is incidental to the employment, and the right thereto ceases with the termination of the service, the possession being all the time that of the owner.

§ 143. **Judicial construction of leases.** It is the province of the court to place a construction upon the lease, and the dominating principle in such cases is to effectuate the intention of the parties, wherever this can be done without infringing some particular rule of law or maxim of equity. In some instances it is customary, upon controverted questions of fact, for the court to instruct its conscience through the intervention of a jury, and on the findings of fact to impress the law applicable to the given case. Even in the case of written contracts oral evidence is admissible to explain doubtful paragraphs, although it is an elementary rule that resort cannot be had to this mode of evidence in order to vary the distinct terms of the writing itself.³⁷⁸

³⁷⁶ *Austin v. Sawyer*, 9 Cow. 39.

³⁷⁷ *Fry v. Miller*, 45 Pa. St. 441.

³⁷⁸ *Eveleth v. Wilson*, 15 Me. 109; *Peterson v. Grover*, 20 Id. 363; *Morrill v. Robinson*, 71 Id. 24; *Smith v. Gibbs*, 44 N. H. 335; *Bradley v. Bentley*, 8 Vt. 243; *Brandon Mfg. Co. v. Morse*, 48 Id. 322; *Myrick v. Dame*, 9 Cush. 248; *Finney v. Bedford Commercial Ins. Co.* 8 Met. 348; *Fay v. Gray*, 124 Mass. 500; *Drake v. Starks*, 45 Conn. 96; *La Farge v. Rickert*, 5 Wend. 187; *Spencer v. Tilden*, 5 Cow. 144; *Clark v. New York L. Ins. & T. Co.* 7 Lans. 323; *Dalrymple v. Van*

Syckel, 32 N. J. Eq. 826; *Perrine v. Cheeseman*, 11 N. J. L. 207; *Carlton v. Vineland Wine Co.* 33 N. J. Eq. 466; *Heilner v. Imbrie*, 6 Serg. & R. 401; *Hagey v. Hill*, 75 Pa. 108; *Pennsylvania & N. Y. Canal Co. v. Betts*, 1 Weekly Notes, 368; *Weiler v. Hottenstein*, 102 Pa. 499; *Woodruff v. Frost*, 2 N. J. L. 322; *Young v. Frost*, 5 Gill, 287; *Batturs v. Sellers*, 6 Har. & J. 249; *Criss v. Withers*, 26 Md. 553; *Farrow v. Hayes*, 51 Md. 498; *Baltimore Perm. Bldg. & L. Soc. v. Smith*, 54 Id. 187; *Hunting v. Emmart*, 55 Id. 265; *McLean v. Piedmont & A. L.*

Few postulates of the law can be regarded as binding and effective under all possible conditions, and while it is abundantly true that parol evidence is ordinarily inadmissible to vary the terms of a written instrument, it may always be enlisted on the side of those who allege and seek to sustain an allegation of fraud, mistake, accident or surprise. Indeed, it may be said, that fraud is so abhorrent in the eyes of the law that all courts will allow an almost morbid excess of evidence to develop it; they will strain the judicial prerogative to the utmost limit, as to the reception of evidence wherever there are elements in the case that arouse suspicion or create plausible grounds for suspecting duplicity and bad faith. Where these exist the rule is instantly relaxed and the parties are at liberty to "vary the terms of the written instrument" by showing its fraudulent inception and character, whereupon the court will modify or enlarge or totally disregard any and all of its terms.³⁷⁹

In the California Code of Civil Procedure the general doctrine and the exceptions are formulated as follows: Sec. 1856, "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the par-

Ins. Co. 29 Grat. 361; Little Kana-
wha Nav. Co. v. Rice, 9 W. Va.
636; Serviss v. Stockstill, 30 Ohio
St. 418; Irwin v. Ivers, 7 Ind. 308;
Davis v. Liberty & C. G. Road Co.
84 Id. 36; Trentman v. Fletcher, 100
Id. 105; Seckler v. Fox, 51 Mich.
92; McClure v. Jeffrey, 8 Ind. 79;
Abrams v. Pomeroy, 13 Ill. 133;
Belcher v. Mulhall, 57 Tex. 17;
Pickett v. Ferguson, 45 Ark. 177;
Koehring v. Muemminghoff, 61
Mo. 403; Porter v. Sandidge, 32
La. Ann. 449; Elliott v. Connell, 5
Smedes & M. 91; Tennessee & C.
R. Co. v. East Alabama R. Co. 73
Ala. 426; Duff v. Ivy, 3 Stew. 140;
Smith v. Odom, 63 Ga. 499; Fal-
coner v. Garrison, 1 McCord, L.
209.

³⁷⁹ White v. Williams, 48 Barb.
222; Bradbury v. White, 4 Me. 391;
Canterbury Aqueduct Co. v. Ens-
worth, 22 Conn. 608; Rogers v.
Saunders, 16 Me. 92; Blanchard v.
Moore, 4 J. J. Marsh, 471; Margraf
v. Muir, 57 N. Y. 155; Peterson v.
Grover, 20 Me. 363; Van Ness v.
Washington, 29 U. S. (4 Pet.) 232,
7 L. ed. 842; Quinn v. Roath, 37
Conn. 16; Patterson v. Bloomer, 35
Id. 57; Conover v. Wardell, 20 N.
J. Eq. 266; Goodell v. Field, 15 Vt.
448; Chambers v. Livermore, 15
Mich. 381; Best v. Stow, 2 Sandf.
Ch. 298, 7 L. ed. 601; Perry v.
Pearson, 1 Humph. 431; Lawrence
v. Staigg, 8 R. I. 256; Ryno v. Dar-
by, 20 N. J. Eq. 231.

ties and their representatives or successors in interest, no evidence of the terms of the agreement other than the contents of the writing except in the following cases: 1, Where a mistake or imperfection of the writing is put in issue by the pleadings; 2, Where the validity of the agreement is in fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made,

* * * or to explain an extrinsic ambiguity or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties."

Equity has always entertained a wide jurisdiction to rectify mistakes and supply omissions. Wherever it appears that the parties have, through inadvertence, neglected some precise point or failed to note some nice distinction, the court will supply the omission, and not allow a frustration of justice by nullifying the entire transaction. It would seriously discourage the laudable practice of putting contracts into written form, if the omission of some microscopic detail could be seized upon as a ground for avoiding the entire contract. Neither law nor equity will tolerate such a view.³⁹⁰ An extended discussion of this topic will be found in subsequent pages.

TITLE I. ESTATES FOR YEARS — *Continued.*

Art. III. Rent.

SEC. 144. Preliminary.

145. The term rent defined.

146. Kinds of rent.

147. When payable.

148. Landlord's security for the payment of rent.

149. Landlord's remedies on failure of payment.

a. Distraint property to secure rent.

150. Apportionment of rent.

§ 144. **Preliminary.** There are few legal propositions in the entire range of municipal law that are not subject to some modification or exception in certain contingencies. Of these propositions none are more definitely settled or universally recognized than those that impress an obligation on the tenant to pay rent to his landlord in the absence of some express

³⁹⁰ See *Wood v. Hubbell*, 10 N. Y. 479.

stipulation to the contrary. The law will generally presume that some recompense is within the contemplation of the parties. And yet this all but universal rule is subject to an exception, for it is abundantly settled that where a person occupies real estate under a contract for the purchase of it, and the contract is ultimately carried into effect, the law will not imply a promise on his part to pay rent, and an action for use and occupation cannot be maintained against him in the absence of an express promise to pay rent.³⁸¹ The price agreed upon is presumed to be sufficient consideration for the occupation of the land. The title of the purchaser, so far as his right to occupy is concerned, relates back to the time when he first took possession under his contract to purchase, or as the rule is sometimes expressed, the previous tenancy is merged in to the subsequent conveyance of the fee. Thus, in *Gould v. Thompson*, 4 Met. 224, where the plaintiff recovered because the defendant continued to occupy the premises after having refused to execute his contract to purchase, the court say that "had the deed in fact been given, pursuant to the parol agreement, then the tenancy at will would be considered as merged in the executed contract, which, by its terms, would relate back to the time possession was given under the agreement." Similar language is used in *Woodbury v. Woodbury*, 47 N. H. 11.

In *Dakin v. Allen*, 8 Cush. 33, Shaw, Ch. J. says: "But it is sometimes said that one who is thus under a contract for a sale is tenant at will to the owner; in a certain sense he is a tenant at will; as a mortgagor is tenant at will to the mortgagee, because he may enter upon and eject him, if he can do it peaceably, or maintain a real action on his title, and thus gain the possession; he is under no obligation to pay rent unless upon an express agreement."

It is a well established rule that where one is in possession, as tenant at the time he contracts for the purchase of the demised premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown to result from the subsequent agreement.³⁸²

³⁸¹ *Dennett v. Penobscot Fair Ground Co.* 57 Me. 425.

³⁸² 1 Sugd. Vend. 162, 163; John-

ston v. Glancy, 4 Blackf. 94, 28 Am. Dec. 45; *Mahana v. Blunt*, 20 Iowa, 142.

Rents are a peculiar species of incorporeal hereditaments, and they form a very important and interesting title under this branch of the law.

1. Of the various kinds of rents.

Rent is a certain yearly profit in money, provisions, chattels or labor, issuing out of lands and tenements, in retribution for the use, and it cannot issue out of a mere privilege or easement.³⁸³ Hence, if, in the same instrument, chattels and lands are let in such a way that it is impossible to separate the consideration to be paid for the real, from that to be paid for the personal property, there can be no distress.³⁸⁴ In *Mickle v. Miles*, 31 Pa. St. Rep. 20, the case of the *Commonwealth v. Contner*, was commented upon and explained, and it was held that a rent might issue out of lands and tenements corporeal and their furniture, and to such a rent the right of distress is incident. There were, at common law, according to Littleton, (a) (sec. 213), three kinds of rent, viz: rent service, rent charge, and rent seck. Rent service was where the tenant held his land by fealty, or other corporeal service, and a certain rent; and it was called rent service because there was some corporeal service incident to the tenancy, as fealty, homage, or other service. A right of distress was inseparably incident to this rent.³⁸⁵ Rent charge or fee farm rent, is where the rent is created by deed, and the fee granted; and as there is no fealty annexed to such a grant of the whole estate, the rent charge was not favored at common law. The right of distress is not an incident, and it requires an express power of distress to be annexed to the grant, which gives it the name of a rent charge, because the lands are, by the deed, charged with a distress.³⁸⁶ In the case of *Ingersoll v. Sergeant*, 1 Whart. 337, the law on this head is learnedly reviewed and discussed by Mr. Justice Kennedy; and it is declared, that the statute of *quia emptores* (18 Edw. I), was never in force in Pennsylvania, and that a rent reserved to grantor and his heirs, in the grant of lands in fee, is a rent

³⁸³ (c) 2 Blacks. Com. 41; Gilbert on Rents, 9 Co. Litt. 142, a; Buz-zard v. Capel, 8 Barn. & Cres. 141.

³⁸⁴ *Commonwealth v. Contner*, 18 Penn. 439.

³⁸⁵ (b) Litt. sec. 215; Co. Litt. 142, a; *Kenege v. Elliot*, 9 Watts, 258.

³⁸⁶ (c) Litt. sec. 217; Co. Litt. 143, b; Gilbert on Rents, 155.

service and not a rent charge. The release of part of the ground from the rent does not therefore extinguish the whole, and the remainder of the land remains subject to a due proportion of the rent. Rent seck, siccus, or barren rent, was rent reserved by deed, without any clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land. The owner of the land was accordingly driven to the slow and tedious remedy by a writ of annuity, or a writ of assize.³⁸⁷ But the statute of 4 Geo. II, c. 28, abolished all distinction between the several kinds of rent, so far as to give the same remedy by distress in cases of rents seck, rents of assize, and chief rents, as in the case of rent reserved upon a lease.³⁸⁸

§ 145. **The term rent defined.** "Rent" is usually a sum of money, but may consist of services or products of the soil, paid for the use of land and its appendages.³⁸⁹ "Profits" when applied to realty, refer to and consist of the products of the soil, whether in the form of coal, metals, emblements or rents received for the same.³⁹⁰

Generally speaking, the interpretation of the words "rents and profits" is that they mean the annual rents and profits.³⁹¹

Rent is the compensation to be paid for the occupation of land by a tenant, whether he holds under a written lease, at will or sufferance, and whether the amount to be paid is or is not defined by the parties.³⁹²

³⁸⁷ (d) Litt. secs. 213, 217, 218, 235. 236; Co. Litt. 150, b, 160, a; Gilbert on Distresses, 6.

³⁸⁸ *Note on ground rent.*—Ground rent is rent paid for the privilege of building on another's land.—*Webster*.

A rent paid by a lessee who has built on the ground leased, and thus distinguished from the rent paid to him by the tenants of the buildings.

In Pennsylvania, this term is used to denote a fee farm rent. (1 Hilliard's Real Prop. 239; 1 Burrill's Law Dict.)

Ground rent deeds and leases frequently contain a clause authorizing the landlord to reënter on the non-payment of rent, or the breach of some covenant, when the estate is forfeited. (Story, Eq. Jur. sec. 1315; 1 Fonb. Eq. B. 1, c. 6, sec. 4, note h.)

³⁸⁹ 2 Bl. Com. 41; Hill. on Real Prop. 227.

³⁹⁰ 1 Washb. on Real Prop. 384; 2 Bl. Com. 41.

³⁹¹ *Heneage v. Lord Andover*, 3 Younge & Jerv. 360; *Allan v. Blackhouse*, 2 Ves. & B. 65.

³⁹² 2 Bl. Com. 41; Co. Litt. 144.

The ordinary definition of rent, as a profit issuing yearly out of lands and tenements corporeal, does not include all the cases; as, where a furnished house or stock farm is leased. In every such case the personal property is a part of the consideration, so that it is only by a fictitious accommodation of the case to the defective definition that we can say that the rent issues exclusively out of the land. A rent may issue out of lands and tenements corporeal, or out of them and their furniture.³⁹³

Ground rent, estates. In Pennsylvania, this term is used to signify a perpetual rent issuing out of some real estate. This rent is redeemable where there is a covenant in the deed that, before the expiration of a period therein named, it may be redeemed by the payment of a certain sum of money, or it is irredeemable, when there is no such agreement; and, in the latter case, it cannot be redeemed without the consent of both parties.³⁹⁴

§ 146. **Kinds of rent.** By resorting to the law dictionaries it will clearly appear that there are several kinds of rent, and such terms as "rent seck," "rent charge," "rent service," "barren rent," "quit rent," and "ground rent," speedily convince us that the subject is involved in more or less intricacy. Much of this, however, disappears after a brief research. Mr. Boone condenses the entire subject in section 107 of his well known manual on the Law of Real Property, from which I quote: "A rent service, which was the only kind originally known to the common law, and the one which prevails in the United States, is where the tenant holds his lands by fealty and certain rent, or by rendering services. It was called a rent service, because it was given as a compensation for the services to which the land was originally liable; and a right of distress was inseparably incident to it. Rent charge is a rent reserved where the landlord has no reversionary interest, and for such rent no right to distrain exists, unless the power be contained in the

³⁹³ *Mickle v. Miles*, 31 Pa. 21 (1856), *Lowrie, J.*; *Anderson's Law Dict.* R. 98; *Cro. Jac.* 510; 6 *Halst.* 262; 7 *Wend.* 463; 7 *Pet.* 596; 2 *Bouv. Inst.* n. 1659, and note.

³⁹⁴ See 1 *Whart. R.* 337; 4 *Watts*

lease. A rent seck, or barren rent, is the same as a rent charge, except that there is no right to distrain reserved. A fee farm rent is a perpetual rent reserved on a conveyance of lands in fee simple. But after the statute *quia emptores* (18 Edw. I, A. D. 1290), a fee farm rent became impracticable, for the reason that a grantor in fee retains no reversion, which is essential to a rent service."³⁹⁵ In the case last cited Mr. Justice Story says: "Upon full consideration, however, we are of opinion that the assignee of a fee farm rent, being an estate of inheritance, is upon the principles of the common law entitled to sue therefor in his own name. It is an exception from the general rule that choses in action cannot be transferred; and stands upon the ground of being not a mere personal debt, but a perdurable inheritance. Thus, if an annuity is granted to one in fee, although it be a mere personal charge, yet a writ of annuity lies therefor by the common law, not only in favor of the party and his heirs, but of their grantee. So the doctrine is expressly laid down by Lord Coke (Co. Litt. 144, b), and he is fully borne out by authority, and in like manner for a rent granted in fee and charged on land, a writ of annuity also lies in favor of the assignee, at his election."³⁹⁶

§ 147. **When payable.** Rent may be, and frequently is, payable in advance.³⁹⁷ But the law will never indulge the presumption that this method of payment has been agreed upon and the party asserting it must prove it. In the majority of instances, of course, the time is fixed by express agreement. As it is by far the principal incident in the entire relation between landlord and tenant, it may be safely assumed that the recitals of the lease will be specific on this point. When, however, the time of payment has been omitted, and is not fixed by some custom of the particular locality, it is not payable until the end of the term.³⁹⁸ And where the

³⁹⁵ Citing inter alia *Wallace v. Harmstad*, 44 Pa. St. 497; *Cornell v. Lamb*, 2 Cow. 656; *People v. Haskins*, 7 Wend. 463; *Kenege v. Elliott*, 9 Watts, 258; *Cuthbert v. Kuhn*, 3 Whart. 357; *Scott v. Lunt*, 7 Pet. 606.

³⁹⁶ Co. Litt. 144, b

³⁹⁷ *Smith v. Shepard*, 15 Pick. 147.

³⁹⁸ *Boyd v. McCombs*, 4 Pa. St. 146; *Perry v. Aldrich*, 13 N. H. 343.

rent falls due on certain regular quarter days, the lessee has until midnight of the last day in which to make such payment.³⁹⁹ As it is a rule of extended application that fractions of a day are not regarded, except when the hour in which a thing is done becomes material,⁴⁰⁰ a day always means twenty-four hours computed from midnight to midnight.⁴⁰¹

The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event — as when an act is to be performed within a specified period from or after a day named — is to exclude the day thus designated, and to include the last day of the specified period.⁴⁰²

The law does not in general, take cognizance of fractions of a day; but the courts may do so when substantial justice requires it.⁴⁰³

§ 148. Landlord's security for the payment of rent. In some of the western States, notably Illinois, the statutory law expressly provides that the lessor may retain a lien on the crops grown upon the premises leased for the just and full payment of the stipulated rent. Such statutes are eminently just. Everywhere a purchase price mortgage has a recognized priority over all other liens, and it is difficult to understand why the same principle is not applied to a lessor. At all events a device of this character has been found wonderfully effective in stimulating good husbandry, and permanent settlements, as landed proprietors can act with great freedom and little risk in leasing their unoccupied farms.⁴⁰⁴ On this subject it may be said that congressional legislation has largely effected this subject. For instance, in the District of

³⁹⁹ *Ordway v. Remington*, 12 R. I. 319.

⁴⁰⁰ *Marvin v. Marvin*, 75 N. Y. 240.

⁴⁰¹ *People v. Nash*, 12 Week. Dig. (N. Y.), 545.

⁴⁰² *Sheets v. Selden*, 2 Wall. 177.

⁴⁰³ *Louisville v. Portsmouth Savings Bank*, 104 U. S. 469; See *Rice's Annotated Code of Civil Procedure* (Colo.), 724.

⁴⁰⁴ See *Hadden v. Knickerbocker*, 70 Ill. 677; *Van Horn v. Goken*, 41 N. J. L. 499; *Worrill v. Barnes*, 57 Ga. 504; *Kenard v. Harvey*, 80 Ind. 37; *Thorpe v. Fowler*, 57 Iowa, 541; *Neifert v. Ames*, 26 Kan. 516; *Heron v. Gill*, 112 Ill. 247; *Stone v. Bohn*, 79 Kan. 141.

Columbia Congress has made provision for a landlord's lien for either the crops raised or any chattels brought upon the premises.

By the Act of Congress, passed February 22, 1867, sec. 12, 14 Stat. at L. 404, the old right of distress for rent was abolished, and instead of it, it was enacted "that the landlord shall have a tacit lien upon such of the tenant's personal chattels upon the premises as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said two months. And this lien may be enforced: 1, By attachment, to be issued upon affidavit that the rent is due and unpaid; or, if not due, that the defendant is about to remove or sell all or some of said chattels; or 2, By judgment against the tenant, and execution to be levied on said chattels or any of them, in whosoever hands they may be found; or, 3, By action against any purchaser of said chattels, with notice of the lien."

It will thus be seen that the act is clear and explicit that the landlord shall have a lien upon the tenant's chattels on the premises (liable to execution) "to commence with the tenancy and continue for three months after the rent is due." It also points out how, within the three months, the lien is to be enforced, namely: by attachment, etc. In a late case the chattel was on the premises, it was attached within three months after the rent accrued, the suit on the attachment was regularly prosecuted to judgment, and the marshal took the chattel in execution. The case is strictly within the language of the Act, unless the chattel was not "such a chattel of the tenant as is subject to execution."

While the foregoing is correctly expressive of a congressional act, it is of restricted application, and, perhaps, the general rules applicable to the subject would be indicated by the assertion that the tendency is to place lessors upon the same footing with other creditors, and to deny to them any special rights. In many instances provision is made in the lease itself by which the personal property of the tenant is made primarily liable for the accruing rent.⁴⁰⁵

⁴⁰⁵ *Wilkinson v. Kettler*, 69 Ala. 435.

§ 149. Landlord's remedies on failure of payment of rent.

It is indeed fortunate that in thirty-six States of the American Union the reformed or code procedure is now entrenched by legislative sanction. It is especially fortunate for those interested in the topic now under review, in that it enables us to state in direct and simple language that a mass of intricate and technical remedial actions have been swept away into deserved oblivion by the very general introduction of the reformed procedure. The pivotal concept of this modern system aims to abolish the distinction between the old actions at law, and suits in equity, and to institute one form of civil action for the enforcement or protection of a right, and the redress or prevention of a wrong. This is known as a civil action. The aggrieved party is merely required to state his cause of action in ordinary and concise language without unnecessary repetition, and demand such relief as he considers himself entitled to. There are other details, of course, that in a work of this character cannot now be enlarged upon; but they are in no sense intricate and the court will in all cases grant such relief on the trial of the cause as the merits of the situation allow. The entire proceeding is one of extreme simplicity — entirely bereft of the exasperating technicalities, and it is far more speedy, effectual, and economical. The most ordinary intelligence can comprehend the entire proceeding. But as this subject forms the basis of extended discussion in a subsequent chapter, further elaboration is unnecessary.

To entitle the landlord to maintain an action for use and occupation the relation of landlord and tenant must have existed.⁴⁶⁶ But the contract may be implied.⁴⁶⁷

Some privity of contract must be shown, not privity of estate, and the action will not lie in a case of adverse posses-

⁴⁶⁶ *De Pere Co. v. Reynen*, 65 Wis. 271; *Lankford v. Green*, 52 Ala. 103; *Richmond & L. T. Road Co. v. Rogers*, 7 Bush. 532; *Moore v. Harvey*, 51 Vt. 297; *Hall v. Southmayde*, 15 Barb. 32; *Rickey v. Hinde*, 6 Ohio, 371; *Wiggins v. Wiggins*, 6 N. H. 298.

⁴⁶⁷ *Brolasky v. Ferguson*, 48 Pa.

434; *Swart v. Fitch*, 31 N. J. L. 17; *Edmonson v. Kite*, 43 Mo. 176; *Dalton v. Laudahn*, 30 Mich. 349; *Nance v. Alexander*, 49 Ind. 516; *Espy v. Fenton*, 5 Or. 423; *Marquette, H. & O. R. Co. v. Harlow*, 37 Mich. 554; *Pierce v. Pierce*, 25 Barb. 243; *Henwood v. Cheeseman*, 3 Serg. & R. 500.

sion, where either ejectment or trespass is the proper remedy. To sustain the action the plaintiff must allege and prove title in himself and occupation by the defendant.⁴⁰⁸ Mere proof that the defendant occupied the premises without the assent of the owner is sufficient as the law will then imply an agreement to pay a reasonable sum as rent,⁴⁰⁹ unless the character of the occupancy negatives the idea of payment. The action for mesne profits following an action of ejectment, is an action in the nature of use and occupation. In fact these two forms of action are generally identical, they import the same thing and result in the indemnification of the owner for the rental value of the estate.

a. *Distraining property to secure rent.* Under the common law the right of distraining property was one of considerable importance. Lessors were allowed to seize the chattels of the tenant found on the premises leased, and sell the same to secure satisfaction of their claims. The entire proceeding was conducted with considerable harshness, and statutory provision in this country has greatly modified the rules of the common law.⁴¹⁰ In New York and in all of the New England States the remedy is unknown, and in the few jurisdictions that give it any countenance it is bereft of many of its common law features. In an action of distress the rent must be fixed and certain and not the *quantum meruit*.⁴¹¹ A previous demand is not necessary before beginning the action. The amount claimed must be reasonably certain.⁴¹² It must be made on the premises and in the day time.⁴¹³ And it is a right that cannot be defeated by the lessor's accepting a chattel mortgage as security.⁴¹⁴ The landlord is doubtless entitled to all the remedies the law gives him. But after protecting himself by a chattel mortgage his right to distrain should be held in abeyance unless it appears that the mortgage security was worthless.

⁴⁰⁸ Clark v. Green, 35 Ga. 92.

⁴⁰⁹ Rogers v. Libb, 64 Barb. 73.

⁴¹⁰ Cornell v. Lamb, 2 Cow. 656;

3 Kent's Com. 473; Youngblood v. Lowry, 2 McCord, 39.

⁴¹¹ Hatfield v. Fullerton, 24 Ill.

278; Johnson v. Prussing, 4 Ill. App. 575.

⁴¹² Poer v. Peebles, 1 B. Mon. 3.

⁴¹³ Hadden v. Knickerbocker, 70 Ill. 677.

⁴¹⁴ Cambria Iron Co. App. 114 Pa. St. 58.

The old feudal term "distress" referred to the act of process by which personal property was seized by way of pledge to enforce the payment of a debt. As a modern remedy it may be said to have very little observance in this country, although in an emasculated form it is still in vogue in a few of the American States. Generally resort is had to the writ of attachment on mesne process or to an action of covenant or debt, or in assumpsit for use and occupation. By such methods the harshness and injustice of the old remedy is avoided.

§ 150. **Apportionment of rent.** This is nothing more than an equitable adjustment of the accruing rent among the reversioners or remainder men, or any parties legally entitled, where, after the making of the lease, through death, bankruptcy, or any adequate cause, the original lessor is no longer entitled to receive it.⁴¹⁵ In its ultimate essence apportionment requires nothing more than a union of sound common sense with a slight knowledge of arithmetic. For instance, if the lessor dies leaving as his sole heirs at law two sons, the accruing rent would be apportioned equally between them. And the principle applies with varying degrees of nicety as the rights of heirship become more involved. But the rule of apportionment may sometimes be invoked by the tenant himself. As where a portion of the premises demised have been apportioned for public purposes by the exercise of the right of eminent domain. In such case the tenant is entitled to have his rent apportioned.⁴¹⁶ And if the parties themselves cannot agree upon a fair rebate in such cases, the court will do it for them.

We can refer to a single case only, *Foot v. Cincinnati*, 11 Ohio, 408; 38 Am. Dec. 737, where it has been held that the tenant's liability to pay rent to his landlord continues unimpaired after condemnation of the entire tract of land included in the lease, or where so much thereof had been appropriated that the residue was incapable of occupation for any purpose consistent with the lease; and that case is

⁴¹⁵ *Martin v. Martin*, 7 Md. 368; *Reed v. Ward*, 22 Pa. St. 150; *Borie* 371; *Zule v. Zule*, 14 Wend. 76; *v. Crissman*, 82 Id. 185; *Crosby v. Womack v. McQuarry*, 28 Ind. 102. Loop, 13 Ill. 625.

placed upon the principle that the right of eminent domain, or the right of appropriating land to public uses, is not a technical incumbrance on the land, and that such appropriation is not an eviction. And the only cases cited in support of the decision are *Folts v. Huntley*, 7 Wend. 211, and *Parks v. Boston*, 15 Pick. 198, in each of which cases, the demised premises were only partially taken, and the tenant remained in possession of the residue under his lease. In *O'Brien v. Ball*, 119 Mass. 28, where the city of Boston, under an act authorizing it, acquired the title to a tract of land which had been leased by O'Brien to Ball, and the title of the lessor divested in the whole tract, the lessor brought suit against the lessee for rent accruing after divestiture of his title. The court held the lessor not entitled to recover, and said: "But even without eviction by or attornment to the holder of the new title, the liability to pay rent reserved ceased with the termination of the plaintiff's estate." *Barclay v. Pickles*, 38 Mo. 143, was an action by the lessor to recover rent reserved in a written lease. The defendant offered to prove that after the making of the lease, and before the rent sued for accrued, the city of St. Louis had, in a proceeding instituted in the opening of Choteau avenue, in said city, etc., taken the leased property for the opening of said street, and that the title to the property had thereby become vested in the city, etc., which was rejected. The court held the testimony admissible, and said: "As a general rule, whenever the estate which the lessor had at the time of making the lease is defeated or determined, the lease is extinguished with it. If, therefore, a lot of land or other premises under lease is required to be taken for city or other public improvements, the lease, upon confirmation of the report of the commissioners condemning the property, becomes void. When the lessor ceases to have any interest in the property, the rent becomes annihilated."⁴¹⁷ In these cases the discharge of the lessee from liability is placed upon the ground that the landlord's title is absolutely extinguished in the leased estate, and he cannot, therefore, enforce the contract for the payment of

⁴¹⁷ Citing Taylor, Land. & Ten. Cuthbert v. Kuhn, 3 Whart. 357. 31
sec. 519; see Schuyllkill & D. Imp. Am. Dec. 513.
& R. Co. v. Schmoele, *supra*;

rent after its extinguishment. "The tenant's covenant is only to pay a certain sum as rent," says Gray, Ch. J., in *Lamson v. Clarkson*, 113 Mass. 348; 18 Am. Rep. 498, "and in the words of Dodridge, in *Simpson v. Sotherne*, 2 Bulst. 274: 'If it be so that the estate be ended, the contract for the rent will end also; this being but *quid pro quo* the rent for the land.' " The doctrine is well established that, although the lessee cannot show that his lessor had no title to the premises when the tenancy began, he may show that he had a limited estate, only, which was determined by its own limitation before the cause of action accrued, as where he held the estate for the life of another, or the like, which expired during the term,⁴¹⁸ or that he had sold and conveyed the land or has been evicted by title paramount, or that his title has been sold under execution, and conveyed.⁴¹⁹

TITLE II. ESTATES AT WILL, AT SUFFERANCE, OR FROM YEAR TO YEAR.

SEC. 151. Definition and nature of estates at will.

152. Estates at sufferance.

153. Estates from year to year.

154. How created.

155. Incidents of.

156. Judicial hostility to this estate.

157. How determined.

158. Notice to quit.

159. Distinction between an estate at will and an estate at sufferance.

§ 151. Definition and nature of estates at will. This particular estate, once so formidable in the law of real property, is flickering to extinction under the steady displeasure of the judiciary who are swift to seize upon any fact or circumstance that will justify their recognition of an estate from year to year, in what is technically an estate at will. An uncertain tenure of property, such as was created by this estate, had a strong tendency to foster slack and shiftless methods of husbandry, tending to the impoverishment of land

⁴¹⁸ *Lamson v. Clarkson*, *supra*; *Wells v. Mason*, 5 Ill. 84; *St. John v. Quitzow*, 72 Ill. 334.

⁴¹⁹ *Franklin v. Palmer*, 50 Ill. 202;

Kane Co. Suprs. v. Harrington, Id. 232; *Tilghman v. Little*, 13 Id. 239; *Taylor, Land. & Ten.* (8th ed.) sec. 708, and notes.

and the impairment of real estate values. Even in Blackstone's time, estates at will were regarded with suspicion, and in a modern text-book, projected along the lines of advanced judicial sentiment, the subject has lost very much of its ancient importance.⁴²⁰

Lord Coke defines a tenancy at will to be "where lands and tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which the lessee is in possession. The lessee is called tenant at will, because he hath no certain or sure estate, for the lessor may put him out at what time it pleaseth him." And there is another species of tenancy called a tenancy by sufferance, which happens where the tenant holds over after his term has expired by the lease under which he took possession, without any fresh lease of the owner of the estate. This estate, however, for very good reasons, has come to be generally regarded as a tenancy from year to year, not determinable at the will of either party, except at the end of the current year, and then only by service of the requisite notice. To preserve a uniformity in business transactions, it is usually understood that a year consists of three hundred and sixty-five days; a half year, one hundred and eighty-two days, and a quarter of a year, ninety-one days, and the added day of leap year, and the day immediately preceding it, if they occur in any period to be computed, are reckoned together as one day. And the term "month" is generally understood to mean a calendar and not a lunar month; although all this matter of computation of time is often regulated by statute, but usually in accordance with this rule. When there is no statute upon the subject, the same would doubtless be settled by the local custom. Custom is a law established by long usage. A universal custom becomes common law. If the usage be confined to a particular place, it is a custom; and, in the absence of statutory enactment, customs are allowed to prevail.⁴²¹

A person who is let into possession under an agreement that a lease shall be executed, but in the meantime he shall enjoy the premises upon the terms of such lease, becomes

⁴²⁰ See 2 Bl. Com. 147.

⁴²¹ Tyler on Ejectment & Adverse Enjoyment, 209.

immediately a tenant at will, at least he is so after refusing to take the lease.⁴²²

There is no difference between an express tenancy at will and one created by circumstances or operation of law.⁴²³

§ 152. **Estates at sufferance.** An estate at sufferance imports the coming into the possession of real property through the instrumentality of a lawful title in the first instance, but latterly refusing to vacate the premises when the original term contracted for expires, and in this way "holding over" without legal right. Blackstone enumerates the following instance of estates at sufferance, viz: The estate of a mortgagor who continues in possession after foreclosure. The estate of a tenant for years whose term has expired, or of a grantor who agrees to give possession on a day named and refuses to comply with his agreement; and the estate of a tenant during the life of another person who continues in occupancy after the death of that other.⁴²⁴ Briefly a tenant by sufferance is one who occupies originally by right but continues to occupy without right.⁴²⁵

Bouvier says an estate at sufferance is the estate of a tenant who comes into possession of land by lawful title, but holds over by wrong after the determination of his interest.⁴²⁶ He has a bare naked possession, but no estate which he can transfer or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlord. There is a material distinction between the case of a person coming to an estate by act of the party, and afterwards holding over, and by act of the law and then holding over. In the first case, he is regarded as a tenant at sufferance; and in the other, as an intruder, abator, and trespasser.⁴²⁷

⁴²² 4 Wait, Act. & Def. 204, 205; 3 Id. 48, 49; Taylor, Land. & Ten. sec. 60; Anderson v. Minland R. Co. 4 El. & El. 614; Dunne v. Trustees of Schools, 39 Ill. 578; Goodtitle v. Way, 1 T. R. 736; Hiatt v. Miller, 5 Car. & P. 595; Hamerton v. Stead, 3 Barn. & C. 222; Braythwaite v. Hitchcock, 10 Mees. & W. 497.

⁴²³ See Western U. Tel. Co. v. Fain, 52 Ga. 21.

⁴²⁴ 2 Bl. Com. 150.

⁴²⁵ Anderson v. Brewster, 44 Ohio St. 580; Cook v. Norton, 48 Ill. 26.

⁴²⁶ Co. Litt. 57, b.

⁴²⁷ Co. Litt. 57, b; 2 Inst. 134; Cruise's Dig. t. 9, c. 2; 4 Kent's Com. 115; 13 Serg. & Rawle, 60; 8 Id. 459; 4 Rawle, 459; 4 Rawle's R. 126.

A tenancy at sufferance only occurs when one comes into possession of the premises lawfully, but fails or refuses to remove after the determination of his term.⁴²⁸ In the case last cited the distinction between tenancies at will and tenancies at sufferance, or from year to year, is carefully outlined. The courts say: "When the tenant holds over by consent, either express or implied, after the determination of an estate for years, it is held to be evidence of a new contract without any definite period for its termination, and in either case is construed to be an estate from year to year. And a tenant holding over after the expiration of his lease will be presumed to hold under, and subject to the terms of the preceding lease."

A parol agreement, made before the expiration of a written lease for a further occupation of one year on the same terms, is within the Statute of Frauds, being a contract not to be performed within a year, and the tenant holding over and disclaiming the agreement, is a tenant at sufferance.⁴²⁹

A tenant by sufferance is now in New York entitled to one month's notice to quit.⁴³⁰ And if the landlord elects, as he may, to treat the tenant as holding under the terms of the original lease, the tenant cannot deny the tenancy.⁴³¹

Tenants, being admitted into possession under a written contract for a lease for the term of ten years, cannot, after refusing to execute and accept a lease tendered by the landlord, and embracing the terms and conditions specified in the written contract, retain possession of the premises, because the landlord has not complied with the contract in the construction and finish of the building which he was to erect for occupation by the tenants. The landlord's violation of his contract would furnish a cause of action in favor of the tenants for the damages sustained thereby, but would not operate as a license to occupy and use the premises. After refusal to execute and accept the lease tendered, they would be mere tenants at will, and, after two months' notice, would

⁴²⁸ *Finney v. City of St. Louis*, 39 Mo. 177.

⁴²⁹ *Delano v. Montague*, 4 Cush. 42; *Russell v. Fabyan*, 34 N. H. 218.

⁴³⁰ Rev. Stat. (4th ed. 1852) part 2, chap. 1, tit. 4, sec. 7; see *Livingston v. Tanner*, 12 Barb. (S. C.) 481.

⁴³¹ *Conway v. Starkweather*, 1 Den. 113.

be subject to eviction, by summary proceedings provided by statute, as tenants holding over.

§ 153. **Estate from year to year.** A lease for one year "and an indefinite period thereafter, with annual rent and continued occupation," makes a tenancy from year to year.⁴³² Tenancy at an annual rent, which has been paid for several years, without lease or agreement, is from year to year.⁴³³ If a person is let into possession of land, under an agreement to purchase, it amounts in law to a bare tenancy at will, and is determined by the death of the lessor.⁴³⁴ The Code of Iowa, sec. 1208, provides that any person in possession of real property, with the assent of the owner, is presumed to be a tenant at will, unless the contrary is shown.

Estates at will are turned into estates from one year to another, or estates for years, by the operation of statutes or by force of decisions of the courts.

The privilege of determining a tenancy at will upon the mere caprice of the lessor being found to greatly inconvenience the lessee, the courts held that such relation was a tenancy from year to year. Again, a tenant at will was not entitled to notice to quit, but the rule obtained that he held from year to year, so far at least as to entitle him to notice six calendar months prior to the day when the lessor desired to resume possession, except where the tenant was already apprised of the end of the term. A general tenancy at will is construed as a tenancy from year to year. Beginning a new year, by sufferance on the part of the lessor, is a tacit renovation of the contract for another year, subject to the right of distress and half a year's notice to quit.⁴³⁵

The tendency of the courts is to construe all general or doubtful tenancies into estates from year to year, and parol leases, under which the Statute of Frauds constitute estates

⁴³² *Pugsley v. Aikin*, 1 Kern. 494; see also *Lockwood v. Lockwood*, 22 Conn. 425; *Huger v. Dibble*, 8 Rich. Law, 222; *Snowhill v. Snowhill*, 3 N. J. 447; *Hunt v. Morton*, 18 Ill. 75.

⁴³³ *Hall v. Wadsworth*, 2 Wms. (28 Vt.) 410.

⁴³⁴ *Manchester v. Doderidge*, 3 Ind. 360.

⁴³⁵ 2 Bl. Com. 147; 4 Kent, 112-14; 1 Johns. 322; 2 Id. 75; 6 Id. 272; 7 Id. 1, 4; 8 East, 167; 8 T. R. 3; *Anderson's Law Dict.* 1127.

at will, are turned into estates from year to year by the payment and acceptance of rent, or other circumstance indicating that it is the intention of the parties. So when a tenant holds over after the expiration of a lease for years he will be considered as a tenant from year to year.⁴³⁶

§ 154. **How created.** In Maine holding over by consent creates only a tenancy at will,⁴³⁷ and the burden of proof is on the tenant to show the landlord's acquiescence.⁴³⁸ A tenant holding over holds subject to all covenants in the expired lease which are consistent with yearly tenancy.⁴³⁹

There are various methods of creating this estate, but in the majority of instances it is created by holding over after the expiration of the term.⁴⁴⁰ Again, it may be and frequently is created by entering, under an agreement to purchase.⁴⁴¹ Again, the entry may be peaceable, and by virtue of a lease void, under the Statute of Frauds.⁴⁴² And in other instances it is created by the landlord's allowing the party to take possession without any stipulation as to rent or length of occupancy.⁴⁴³ Generally, it may be said, that the tenancy always results by force of some contractual relation either express or implied. More accurately, let us say, the original holding results from some contract express or implied.⁴⁴⁴

§ 155. **Incidents of.** A tenant at will has no certain indefeasible estate; nothing that he can assign. The estate is at the will of both parties, landlord and tenant, so that either one may determine his will, and quit connection with the other at pleasure. But if the tenant sows his land, and the landlord, before the grain be ripe or before it is reaped, puts him out, the tenant shall have the crops planted, and free ingress and egress to cut and carry them away. But where the ten-

⁴³⁶ 6 Am. & Eng. Cyc. of Law, 888, 889.

⁴³⁷ Kendall v. Moore, 30 Me. 327.

⁴³⁸ Chesley v. Welch, 37 Id. 106.

⁴³⁹ Hyatt v. Griffiths, 33 Eng. L. & Eq. 75; Vrooman v. McKaig, 4 Md. 450; Prickett v. Ritter, 16 Ill. 96.

⁴⁴⁰ Bennock v. Whipple, 12 Me. 346.

⁴⁴¹ Patterson v. Stoddard, 47 Me. 355; Foley v. Wyeth, 84 Mass. 131; Harris v. Frink, 49 N. Y. 24.

⁴⁴² Talmo v. Spitzmiller, 120 N. Y. 37.

⁴⁴³ Dame v. Dame, 38 N. H. 429; Wright v. Roberts, 22 Wis. 161.

⁴⁴⁴ Perine v. Teague, 66 Cal. 446.

ant voluntarily determines the estate, the landlord has the profit of the land. The law is careful that no sudden determination by one party shall prejudice the other; and the courts lean against construing demises, where no certain term is mentioned, to be tenancies at will, but rather hold them to be tenancies from year to year.⁴⁴⁶

If the tenant is in possession, under a contract to purchase the property, and the terms of this contract are still open and unsettled, he is not liable for rent. If, after the expiration of a reasonable time, the sale is abandoned, though through no fault of his, he may be held liable for use and occupation.⁴⁴⁶ It is said that he is entitled to emblements.⁴⁴⁷ But this assertion seems to rest upon a very shadowy foundation.⁴⁴⁸ The fact that he may take the away-going crops⁴⁴⁹ should not affect the question of emblements. The tenant at will has the right to sublet, provided, of course, he can find a sub-tenant willing to take so dubious a tenure.⁴⁵⁰ And the familiar principle of estoppel which prevents his disputing his landlord's title, is an incident of the tenancy.⁴⁵¹ He is also entitled to a reasonable opportunity according to the circumstances of each case, to remove his family and household goods, and he is not liable to trespass when going to or from the premises for such a purpose.⁴⁵² The death of the lessor terminates the tenancy, and reduces the lessee one grade lower by making him a tenant at sufferance only.⁴⁵³ It has been held that he is not entitled to notice to quit.⁴⁵⁴ But great caution must be exercised in construing this proposition strictly, as the better reasoned cases rather assert the contrary view. Indeed, it may be said that these arbitrary exactions regarding the dispossession of tenants are looked

⁴⁴⁶ Johnson v. Johnson, 13 R. I. 468.

⁴⁴⁶ Hough v. Birge, 11 Vt. 190; Dwight v. Cutler, 3 Mich. 566; Coffman v. Hauck, 24 Mo. 496.

⁴⁴⁷ Morgan v. Morgan, 65 Ga. 493.

⁴⁴⁸ Simpkins v. Rogers, 15 Ill. 398; King v. Fowler, 14 Pick. 238; Carpenter v. Jones, 63 Ill. 517.

⁴⁴⁹ Martin v. Knapp, 57 Iowa, 336.

⁴⁵⁰ Bennock v. Whipple, 12 Me 346; Goldsmith v. Wilson, 68 Iowa, 685.

⁴⁵¹ Pomeroy v. Lambeth, 1 Ired. Eq. 65.

⁴⁵² Henderson v. Cardwell, 9 Baxt. 389; Simpkins v. Rogers, 15 Ill. 397; Rich v. Bolton, 46 Vt. 84; Harris v. Frink, 49 N. Y. 24.

⁴⁵³ Estey v. Baker, 50 Me. 325.

⁴⁵⁴ Kitchen v. Pridgen, 3 Jones, 49.

upon with disfavor.⁴⁵⁵ The law is careful to protect a tenant so situated from a sudden determination of his tenancy especially from a prejudicial determination that would carry with it the features of hardship. As we have seen there is a decided tendency to abolish these estates at will, and construe them as tenancies from year to year.⁴⁵⁶ Indeed, the Federal Court of Claims, in a comparatively recent case, held that a congressional act of 1864 had actually abolished this species of estate. But an examination of the decision hardly warrants that view.⁴⁵⁷

A taking of land by a city for the purpose of widening a street, without actual eviction, does not determine the estate of a tenant at will of the land, nor does a conveyance in fee of a portion of a parcel of land determine the estate of a tenant at will in the entire parcel.

A tenant at will is not estopped to deny that since his own entry into possession his landlord's title has been determined by the act of the landlord.

If a tenancy at will is terminated between two rent days, by a conveyance of the premises by the landlord to a third person, the tenant is not liable to his landlord for use and occupation of the premises from the beginning of the term to the date of the conveyance.

A tenant at will, who continues to occupy land after a portion of it has been conveyed by the landlord to a third person, is liable as a tenant at sufferance, to pay as rent what the remaining portion of the premises is reasonably worth, from the date of the conveyance to the entry by the grantee.⁴⁵⁸

As to acts of negligence the tenant at will is held to the same degree of care that a prudent and careful man in the possession of his own premises would exercise under like conditions. Of this the court say: "We think this was a most liberal construction in favor of the lessor." The modern law of negligence is a very imperfect approximation to the rulings of Lord Coke's day, but it is doubtful if any satisfactory reason exists for differentiating the application of the rules, in cases of real and personal property or to tenancies at

⁴⁵⁵ *Rich v. Bolton*, 46 Vt. 84.

⁴⁵⁷ 14 Ct. of Cl. 493.

⁴⁵⁶ *Johnson v. Johnson*, 13 R. I.

⁴⁵⁸ *Emmes v. Feeley*, 132 Mass. 346.

will and tenancies for the term. It is certainly idle to follow all the caprices of the judicial mind, and where we may with profit prune away an excrescence "the fear of unsettling the law of real property" should never influence the court unless a statutory inhibition presents a controlling view. Summarizing the present attitude or the law upon this subject of liability, we may say that in the absence of a written instrument that would, of course, control the entire subject, one holding this precarious and undesirable tenancy at will is not liable for the destruction or damage of the premises by fire, even where his own or his servants' negligence contributes to the result. The remedy is in a lease with appropriate covenants which fasten the responsibility where it belongs. This would effectually abolish many of the senseless habits that now menace the entire relation of landlord and tenant, and emancipate a tenancy at will from several of its most objectionable features.

§ 156. **Judicial hostility to this estate.** Quite generally in this country our courts have favored the conversion of all the estates at will, wherein rent or recompense is distinctly reserved, into estates from year to year. This by no means implies that such an estate cannot and does not exist, where such an intendment is evidenced by some express agreement of the parties, and it may always arise from mere permissive occupation of real estate for an indefinite time, provided the element of rent, or some equivalent for it, does not enter into the purposes of the party, and forms no part of their mutual understanding. In all such cases the estate is strictly an estate at will, and no process of legal alchemy will or can transform it into a tenancy from year to year.⁴⁶⁹ Such tenancies are frequently implied when possession is taken under a contract for purchase, or an agreement for a future lease.⁴⁶⁰

§ 157. **How terminated.** The relation of tenant at will terminates upon the death of either party, and any act of either indicating a set intention to terminate the tenancy will have that effect. And an assignment of the tenant's interest does

⁴⁶⁹ Rich v. Botton, 46 Vt. 84; Herrell v. Sizeland, 81 Ill. 457; Say v. Stoddard, 27 Ohio St. 478.

⁴⁶⁰ Freeman v. Hadley, 33 N. J. L. 532; Wood v. Morgan, 88 Ga. 686; Dunne v. Trustees, 39 Ill. 578.

not vest the assignee with any rights as against the owner, and such assignee will acquire the character of a trespasser immediately on entering into possession.⁴⁶¹

An estate at will is not bounded by any definite limits with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties. As it depends upon the will of both, the dissent of either may determine it. Such an estate or interest cannot, consequently, be the subject of a conveyance to a stranger, or of transmission to representatives.⁴⁶²

Any act of the landlord evidencing an intent to assert rights of possession and proprietorship will be construed as sufficient to terminate the estate. But the landlord's action, being entirely volitional, and presumptively without the consent of the tenant at will, entitles the latter to emblement, a right which he does not enjoy where the termination of the estate results from his own individual action. The death of either party determines the interest *eo instanti*.⁴⁶³

A tenant at will has no assignable interest whatever, nor any interest that is subject to levy and sale. His holding is a mere chattel real liable to be terminated at the mere whim or caprice of the party holding the fee or reversion.

A tenancy at will is determined instanter by a demand of possession, though, perhaps, the tenant might afterwards enter, solely for the purpose of removing his goods, without being a trespasser.⁴⁶⁴

If a tenancy at will is for a definite period as for a year or a month, it is determined by its own limitation, without any notice, and it is familiar law that if the lessor alienate his estate by a deed or a written lease, this terminates the tenancy. It is entirely competent for the parties to agree upon some notice by which the tenancy may be concluded.⁴⁶⁵

In *Hamerton v. Stead*, 3 Barn. & C. 483, Littledale, J., said: "Where parties enter under a mere agreement for a future

⁴⁶¹ Rickhow v. Schauck, 43 N. Y. 448.

⁴⁶² Watk. Prin. Con. 1; Co. Litt. sec. 68.

⁴⁶³ Stewart v. Doughty, 9 Johns. 108.

⁴⁶⁴ Doe v. M'Kaeg, 10 Barn. & Cress. 721.

⁴⁶⁵ Davis v. Murphy, 126 Mass. 143.

lease, they are tenants at will; and, if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract."

§ 158. **Notice to quit — Views of Mr. Washburn.** Says Mr. Washburn: "The necessity of giving notice in order to determine a tenancy at will, which has become so general, has reduced the class of estates held strictly at will, to comparatively few in number. They still exist in certain cases, and form a second division of this subject. They are divided into two classes, such as are made so by express agreement of the parties, and such as are created by implication of law." And again, "Because of the uncertainty of the rule requiring reasonable notice in order to determine a parol lease, and from the circumstance that rent was generally measured by the year, courts early adopted a rule, which has been extensively followed in this country, that a general tenancy by a parol lease, when rent is to be paid, shall be considered as a lease for a year, which can only be determined by a notice for the time of at least six months, terminating at the expiration of the year. And if the tenant is allowed to hold without such notice, into a second year, it will be considered as a holding for such second year, and so on. So that the common mode of designating such estates by parol, is an estate from year to year, to continue until either party gives the other the requisite notice to determine it."⁴⁶⁶ A tenancy at will is held to be a tenancy from year to year, merely for the sake of a notice to quit; and the landlord cannot recover possession without the notice; but this notice is not necessary for any other purpose.⁴⁶⁷

The case of *Jackson v Salmon*, 4 Wend. R. 327, was disposed of by the Supreme Court in a very few words, and the opinion is worth quoting, Savage, Ch. J., saying: "The only question in the case is whether the defendant was entitled to

⁴⁶⁶ 1 Wash. on Real Prop. 510, sec. 1, sub. 22, and pp. 519, 520, sec. 2, sub. 1, wherein several authorities are cited, both English and American, including *Lesley v. Randolph*, 4 Rawle's R. 123; *Right v. Darby*,

1 Term R. 159; *Ridgeley v. Stillwell*, 28 Mo. R. 400; *Patton v. Axley*, 4 Jones' L. R. 440.

⁴⁶⁷ *Phillips v. Covert*, 7 Johns. R. 4.

notice to quit. Wells entered into possession lawfully; he hired the premises for one year, and continued in possession after that period; he was tenant from year to year, and was entitled to notice before an ejectment could be brought against him. The defendant, coming in under Wells, stands in the same relation to the lessor. A tenant for a year, holding over, is tenant from year to year, and not at will; but if at will, he was entitled to notice."

Estates at will have become infrequent under the operation of judicial decisions. Where no certain term is agreed on, they are now construed to be tenancies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estate. When the tenant holds over by consent given, either expressly or by implication, after the determination of a lease for years, it is held evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year.⁴⁶⁸

A tenant at sufferance is entitled to no particular indulgence from the landlord in the way of notice to quit, beyond the mere notice to surrender immediate possession, and two days has been held reasonable time in which to terminate this species of tenancy.⁴⁶⁹

In the State of Indiana, the statute declares that estates at will may be determined by one month's notice in writing delivered to the tenant. And a tenancy at will cannot arise without an express contract; and all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord, are to be deemed tenancies from year to year. All tenancies from year to year may be determined by at least three months' notice given to the tenant prior to the expiration of the year; and in all tenancies which, by agreement of the parties, express or implied, are from one period to another of less than three months' duration, a notice equal to the interval between such periods is made sufficient.⁴⁷⁰

If a tenant neglect or refuse to pay rent when due, ten days' notice to quit will determine the lease, when not

⁴⁶⁸ 4 Kent's Com. 210; Cruise's Dig. tit. 9, c. 1.

⁴⁶⁹ Hooton v. Holt, 139 Mass. 54.

⁴⁷⁰ 2 R. S. 1852, part 2, ch. 8, secs. 1, 2, 3; 2 R. S. 1862, ch. 10, secs. 1, 2, 3.

therein otherwise provided, unless such rent be paid at the expiration of said ten days.⁴⁷¹

In Massachusetts the estate of a tenant at will can only be directly terminated in the manner provided by statute, as by a notice to quit at the end of fourteen days for non-payment of rent, or by the three months' notice in writing, and when the rent reserved is payable at periods of less than three months by a notice equal to the interval between the days of payment. There are many acts which a lessor or lessee may do which indirectly will, or may at the election of the other party, operate to determine the lease. Thus, by a conveyance, or by a written lease to a third party by the lessor, the estate of the lessee is terminated.⁴⁷² Upon the commission of waste by the lessee at will, the lessor may enter and determine the estate.⁴⁷³ An assignment of his estate by the lessee at will may be treated by the lessor as terminating it.⁴⁷⁴

In other jurisdictions where the tenant denies the title of his landlord, or does definite acts inconsistent with it, as by accepting a deed from some one other than the landlord, and asserting title under it, the tenancy at will may be terminated by the landlord without any notice to quit. He may bring his action against the tenant as a disseizor, or trespasser, as if he had originally entered by wrong; or he may, if he can do so without violence, repossess himself of the premises.⁴⁷⁵

No notice to quit is ever necessary unless the relation of landlord and tenant exists, and a disclaimer of tenancy dispenses with such notice. If one in as a tenant repudiates this relation, and denies that he holds under his landlord,

⁴⁷¹ 2 R. S. part 2, ch. 8, sec. 4, as amended by Laws of 1867, ch. 75; 2 R. S. 1862, ch. 10, sec. 4.

⁴⁷² Howard v. Merriam, 5 Cush. 563, 583; Curtis v. Galvin, 1 Allen, 215; Hildreth v. Conant, 10 Metc. 298; Mizner v. Munroe, 10 Gray, 290.

⁴⁷³ Daniels v. Pond, 21 Pick. 367.

⁴⁷⁴ Cooper v. Adams, 6 Cush. 87; King v. Lawson, 98 Mass. 309.

⁴⁷⁵ Russell v. Fabyan, 34 N. H. 218, 223; Sampson v. Shaeffer, 3 Cal. 196, 205; Chamberlain v. Donahue, 45 Vt. 50, 55; Isaacs v. Gearhart, 12 B. Mon. (Ky.) 231; Sharpe v. Kelley, 5 Denio, 431; Fusselman v. Worthington, 14 Ill. 135.

the landlord may, at his own election, treat the tenancy as terminated.⁴⁷⁸

A notice from A. to B., a tenant at sufferance, to quit, dated July 3, 1885, and served between six and seven o'clock on the evening of that day, after reciting that A. had "this day leased the tenement," notified B. to vacate the tenement "by Monday, 6th day of July, current, by twelve o'clock, noon." In an action on the Pub. Sts. c. 175, by A. against B., to recover possession of the tenement, it appeared that it was occupied by B., a married man, and was in the second story. The judge, who tried the case without a jury, found as a fact that the notice was sufficient in point of time. Held, that no error in the law appeared.⁴⁷⁹

§ 159. **Distinction between an estate at will and an estate at sufferance.** The line of cleavage between an estate at will and an estate at sufferance is well defined, and yet lawyers and judges are continually losing sight of it. The uncertainty in regard to the incidents can scarcely be a source of wonderment when it is remembered that for more than a century the courts have evidenced a feeling of intense hostility against both of these estates, and have resorted to every legal method, and invoked every equitable maxim in the attempt to discredit and overthrow the entire fabric. And it is quite remarkable that the estate should have the hardihood to survive in any form after such a continuous exhibition of judicial displeasure. As a consequence of this peculiar situation there is a constant tendency to ignore the estate entirely, and, perhaps, a still greater tendency to utterly neglect the subject as a separate branch of study. It is far easier to drop this title entirely from the law of real property, and regard it as assimilated with estates from year to year. There is much reason for this tendency, but in an undertaking like the present the subject must be given due expansion. I think it will be conceded by all close students of the law of real property, that this estate has long ceased to represent a stimulating force in the law of realty. And that,

⁴⁷⁸ Tuttle v. Reynolds, 1 Vt. 80; Duke v. Harper, 6 Yerger, 280; Harrison v. Middleton, 11 Grat. 527; Boston v. Binney, 11 Pick. 1, 8.

⁴⁷⁹ Wardell v. Etter, 143 Mass. 19.

in the due course of time, it will be denied any place on the catalogue of estates.

Returning to the subject of our caption — the distinction between a tenancy at will and an estate at sufferance — we may say the tenant at will is, in the first instance, in possession of the premises demised with the consent of the owner. While a tenant at sufferance holds over when this estate at will has terminated.⁴⁷⁸ He has merely a naked possession.⁴⁷⁹

⁴⁷⁸ *Emmes v. Feeley*, 132 Mass. 346; *Estey v. Baker*, 50 Me. 325.

⁴⁷⁹ *Russell v. Fabyan*, 34 N. H. 218; *Smith v. Littlefield*, 51 Id. 539.

CHAPTER X.

WASTE.

SEC. 160. Definition and nature.

- 161. Common law rules repudiated. -
- 162. Waste either voluntary or permissive.
- 163. Never attributable to one holding the absolute fee.
- 164. Vis major, or act of God.
- 165. Instances of voluntary waste.
 - a. Cutting timber.
 - b. Opening mines.
 - c. Improper tillage.
- 166. Rule as to tenant at will.
- 167. Remedy by action — who may be plaintiffs.
- 168. Injunction relief.
- 169. Resumé of the rules governing the subject of waste.

§ 160. Definition and nature. Waste is whatever does lasting damage to the freehold or inheritance of land, or of anything that alters the nature of the property so as to render the evidence of ownership more difficult, or to destroy or weaken the proof of identity, or diminish the value of the estate, or increase the burden upon it. It is either voluntary or permissive — the former being an offense of commission, such as pulling down a house, converting arable land into pasture, opening new mines or quarries, etc.; the latter is one of omission, such as allowing a house to fall for want of necessary repairs, allowing land to remain flooded with water, etc.

Where a tenant for life pulls down a building and erects a new and better one in its stead, equity will not interfere, this being what is called “meliorating” or “ameliorating” waste. The remedy for waste is an action for damages or an injunction.¹

Waste is any act done to the freehold by the tenant in possession, which changes the character of the inheritance.

¹ See Rapalje & Lawrence Law Dict. tit. Waste.

Hence, even acts which increase the value of the estate may be waste. The persons who are liable for waste are tenants for life, for years, at will and at sufferance. Waste is voluntary when it consists in doing something which the tenant had no right to do, and permissive when it consists in the omission of acts which it was his duty to perform. Instances of the former are destroying trees, opening mines, etc.; of the latter, letting a house go to ruin. The property must be depreciated in value for the reversioner to recover in the case of permissive waste. In the case of voluntary waste, the mere act is enough upon which to ground an action. It is considered to be waste, if the property is injured by fire through the negligence of the tenant. Estates are sometimes limited "without impeachment of waste." This gives the tenant the right to commit waste, but equity will interfere to prevent an unconscionable use of the privilege, as if he were to pull down the principal house. The best remedy against waste is by injunction.²

In one case it appears in the findings that, during the occupancy under the lease, ornamental trees were destroyed, fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel was dug from a stone quarry and gravel-pit on the premises, and taken away. This was held voluntary waste, and within the prohibition of the implied agreement in the lease.³

Waste may be committed not only by destruction, but by alteration of any part of a tenement. Thus, the conversion of land from one species to another, as of woodland into arable, and *vice versa*, is waste.⁴ The conversion of two chambers of a tenement into one is waste.⁵ And, in general, whatever does a lasting damage to the freehold or inheritance, is waste.⁶ As to what particular acts by a tenant constitute waste, see Arch. Land. & Ten. 197-201; Roscoe's Real Act, 116-119; Cruise's Dig. tit. iii, ch. 2. For the American law of waste, see 4 Kent's Com. 76-82; 11 Metcalf's R. 304,

² A Guide to Law. 158.

³ United States v. Bostwick, 94 U. S. 53.

⁴ 2 Bl. Com. 282; 7 N. H. R. 171.

⁵ 4 Kent's Com. 76, note.

⁶ 2 Bl. Com. 281.

310-312; United States Digest, Waste; 1 Hilliard's Real Prop. 262-267; 1 Greenleaf's Cruise's Digest, 115-120, notes.⁷

There is one general rule regulating the subject of waste which, in this country, at least, is always in the ascendancy, viz: "The act complained of must be palpably prejudicial to the inheritance — a manifest damage to the property, or one which will injuriously affect the reversioner."⁸

§ 161. **Common law rules repudiated.** The ancient doctrine of waste, if universally adopted in this country, would greatly impede the progress of improvement, without any compensatory benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here, as it has been frequently decided.⁹

In this country it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.

The American cases have modified the law of waste, to adapt it to the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and uncultivated lands.¹⁰

In *Neel v. Neel*, 19 Pa. St. 323, a coal mine had been opened and worked for family use, and for the benefit of the neighbors, but a very inconsiderable quantity had been taken out. In that case Judge Lowry said: "It seems, in this case, that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines, etc., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and, if necessary to the proper working of them, to make new openings in the ground."

⁷ Cited from 2 Burrill's Law Dict.

⁸ *Pyncheon v. Stearns*, 11 Metc.

304.

⁹ *Winship v. Pitts*, 3 Paige, 259.

¹⁰ *Hastings v. Crunckleton*, 3

Yeates, 261; *Findlay v. Smith*, 6

Mumf. 134; *Ballentine v. Poyner*,

2 *Hayw.* 110; *Neel v. Neel*, 7 *Harris*,

323; *Irwin v. Covode*, 12 *Id.*

162.

In support of these views he cites the English and American cases, and expresses himself without reference to the statute of 1848.

Chancellor Kent says: "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country."¹¹

The cases referred to will show a strong inclination to amplify the privileges of the life tenant.

In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction.

§ 162. Waste either voluntary or permissive. As previously stated waste is regarded as voluntary or permissive. The first imports the doing of some aggressive act which results in permanent damage to the inheritance. It has been called active waste.¹² While permissive waste results from gross negligence, inattention, and improvident management, its active manifestation is where buildings are suffered to rot and decay; or walls fall in for want of plastering; or the property is damaged by rain for the want of a few shingles.¹³

A voluntary waste is an act of commission, as tearing down a house. This kind of waste is committed in houses, in timber, and in land. It is committed in houses by removing wainscots, floors, benches, furnaces, window glass, windows, doors, shelves, and other things once fixed to the freehold, although they may have been erected by the lessee himself, unless they were erected for the purposes of trade. (See Fixtures.) And this kind of waste may take place not only in pulling down houses, or parts of them, but also in changing their forms; as, if a tenant pulls down a house and erects a new one in the place, whether it be larger or smaller than the first;¹⁴ or convert a parlor into a stable; or a grist mill into a fulling mill;¹⁵ or turn two rooms into one.¹⁶ The build-

¹¹ 4 Kent's Com. 76.

¹² See *Peirce v. Burroughs*, 58 N. H. 304.

¹³ Co. Litt. 53a.

¹⁴ 2 Roll. Ab. 815, 1, 33.

¹⁵ 2 Roll. Ab. 814, 815.

¹⁶ 2 Roll. Ab. 815, 1, 37.

ing of a house where there was none before is said to be a waste;¹⁷ and taking it down after it is built, is a waste.¹⁸ It is a general rule that when a lessee has annexed anything to the freehold during the term, and afterwards takes it away, it is waste.¹⁹

§ 163. Never attributable to one holding the absolute fee. Such a holder is privileged to commit any sort of depredation upon the property that his whim or fancy may suggest.²⁰ There is much refined theorizing in the English text-books, which is in no sense applicable to the doctrine as it obtains in this country. The wholesale destruction of our forests in the process of clearing up would, in England, expose a tenant to the severest penalties of the law, while in this country it would be regarded as a laudable procedure comporting with all our ideas of good husbandry. Still the circumstances of each case must largely govern the determination of the question, and a review of all the evidence is generally necessary to reach a correct conclusion.²¹

It is never considered waste for the tenant in possession to provide himself with reasonable estovers.²² And the whole subject is more or less controlled by local usage. It would be utterly impracticable to formulate an iron clad rule that would apply to all sections of the country. Every case must repose upon the facts and circumstances that environ it. And particular attention must be given to the statutory law of the different States.²³ As regards the remedy, an action will lie for either permissive or voluntary waste, but it is difficult to see how an injunction can lie for *permissive waste*. To restrain a man from doing nothing, might be a process of some difficulty.

§ 164. Vis major, or act of God. Any unforeseen calamity which no amount of activity or vigilance could prevent is generally excusable, but the tenant is obligated to such

¹⁷ Co. Litt. 53a.

¹⁸ Com. Dig. Waste, D 2.

¹⁹ 3 East, 51; 2 Bouvier's Law Dict.

²⁰ Duvall v. Waters, 1 Blands. Ch. 569.

²¹ Lynn's App. 31 Pa. St. 44; McGregor v. Brown, 10 N. Y. 14.

²² Webster v. Webster, 33 N. H. 18.

²³ Hamden v. Rice, 24 Conn. 350.

prompt and efficient measures as are within his power, to render casualties by wind, flood, fire, or earthquake, as light as possible. He must adopt all reasonable measures to reduce the damages to their minimum, and is never allowed to make bad worse through neglect and inattention.

Act of God. Such inevitable accident as cannot be prevented by human care, skill or foresight — an earthquake is a very apt illustration — it is something superhuman or out of the ordinary course of nature. "Every act of God is an 'inevitable accident,' because no human agency can prevent it. But it by no means follows that every 'inevitable accident' is an act of God. Damage done by lightning is an inevitable accident, and also an act of God, but the collision of two vessels in the dark, is an inevitable accident, and not an act of God."²⁴ Where the performance of a contract becomes impossible through an act of God, the promissor is in many cases discharged from liability. Thus, if a lessee of land covenants to leave a wood in as good a plight at the end of the lease as it was at the beginning, and afterwards the trees are blown down by a tempest, he is discharged from his covenant.²⁵ Whether an event is an act of God for the purposes of a particular contract depends on the nature of the contract and the event, especially on the question whether it can be foreseen and provided against for the purposes of the contract.²⁶

There is a large class of cases in which injury is suffered by a party, where the law gives no redress. If a tree growing upon the land of one is blown down upon the premises of another, and in its fall injures his shrubbery, or his house or his person, he has no redress against him upon whose land the tree grew. If one builds a dam of such strength that it will give protection against all ordinary floods, the occurrence of an extraordinary flood by which it is carried away, and its remains are lodged upon the premises of the owner below, or by means whereof the dam below is carried

²⁴ *Le Grand*, Ch. J., in *Ferguson v. Brent*, 12 Md. 33, and see *McHenry v. Philadelphia & C. R. Co.* 4 Harr. 449; *Hayes v. Kennedy*, 41 Pa. St. 379; dissenting opinion by

Thompson, afterwards chief justice; *Chicago R. R. Co.* 69 Ill. 289.

²⁵ 1 Rep. 98a; L. R. 4 Q. B. 185.

²⁶ See *Poll. Cont.* 335; *Rapalje & L. Law Dict.* tit. "Act of God."

away, or the mill building is destroyed, gives no claim against the builder of the dam. In these cases the injury arises from a fortuitous occurrence beyond the control of man. It is termed the act of God. The party through whom it occurs is not responsible for it. The party suffering from it must submit to it as a providential dispensation.²⁷

§ 165. **Instances of voluntary waste.** a. *Cutting timber.* Timber is the body, stem or trunk of a tree, or the larger pieces or sticks of wood which enter into the framework of a building or other structure, excluding the plank, boards, shingles, or lath used to complete the structure.²⁸ It includes trees of any size that may be used in any kind of manufacture or the construction of any article.²⁹ The particular meaning depends upon the connection in which the word is used or the calling of the person by whom it is used.³⁰ Cutting down timber is one form of waste except so far as it is required for estovers. While the timber is standing it constitutes a part of the realty; severed from the soil, its character is changed; it becomes personalty, but its title is not affected; it continues to be the property of the owner of the realty, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of wrongful removal of personalty.³¹

b. *Opening mines.* It is quite customary for text writers on the subject of waste to insert a paragraph captioned after the manner of this one, and then insert some matter of fact phrases to the effect that it is not waste to operate a mine already opened, or is waste to open a new one. To the present writer all this is pure nonsense. If the tenant comes into possession of premises already enjoying the distinction of mining property, his occupancy is almost infallibly with reference to the mining rights. These constitute the subject matter of his tenancy, the very thing he contracted to control, the sole object he had in securing the lease. If, on the

²⁷ Ryan v. New York Cent. R. R. Co. 35 N. Y. 210; Anthony v. Harvey, 8 Bing. 191; Story on Bail. sec. 83;

²⁸ Babka v. Eldred, 47 Wis. 192.

²⁹ United States v. Murphy, 32 Fed. Rep. 379.

³⁰ United States v. Stioes, 14 Fed. Rep. 825.

³¹ Schulenburg v. Harriman, 21 Wall. 64.

other hand, he discovers a mine on the property, we are unacquainted with any law which prevents his development of it. So far as any question of waste is concerned, he must work his mine, either an old one or a new one, with due respects to the ordinary precautions and methods. But unless restrained by some controlling recital in the instrument under which he holds possession, it cannot be regarded as waste to merely operate or develop the mine.

c. *Improper tillage.* The occupant of the premises is chargeable with waste where, through improper attention to the demands of good husbandry the fertility of the soil is impoverished, or the land is allowed to relapse into an untillable condition through the growth of underbrush and sapplings.³² Custom and usage may sometimes decide a question of waste, as it is well settled that any method which is generally adopted by good cultivators in the vicinity would justify an action, that might under other circumstances be stigmatized as waste.³³

§ 166. **Rule as to tenant at Will.** It was early decided in a case of some celebrity, *that if a tenant at will* negligently kept or guarded his fire, whereby the house was burned, this was permissive waste, for which he was not liable to his landlord.³⁴ And we are obliged to admit that the present law exonerates a tenant at will from all liability for permissive waste.³⁵ The Massachusetts statute gives an action for waste, or of tort in the nature of waste, against a tenant in dower, by the curtesy, or for life or years, but not against a tenant at will.³⁶ Such a tenant is not liable to his landlord for the mere negligence of either himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises. But he is held to a strict accountability for gross negligence or reckless disregard of ordinary precaution.³⁷ Modern text writers find abundant

³² *Clemence v. Steere*, 1 R. I. 272.

³³ *Webster v. Webster*, 33 N. H. 25.

³⁴ *The Countess of Shrewsbury's Case*, 5 Rep. 13, b.

³⁵ *Moore v. Townsend*, 4 Vroom,

284; *Harnett v. Maitland*, 16 M. & W. 257; *Coale v. H. & St. J. R. R. Co.* 60 Mo. 227.

³⁶ Pub. Stat. C. 179.

³⁷ *Lathrop v. Thayer*, 138 Mass.

466.

justification for the assertion that buildings burned through the negligent management of fires, on the part of tenants, come within the old common law theory of "permissive waste," and the loss incident to such burning falls upon the landlord, or more generally, upon the insurance company.³⁸ The case of *Scott v. Hale*, 16 Me. 326, might have presented some very elucidative incidents, as this identical question was directly involved. But unfortunately it was decided on an insignificant side issue, as the court very naturally declined the consideration of an intricate question when the situation of the record presented gave an easy mode of escape.

§ 167. **Remedy by action—who may be plaintiffs.** As we have previously stated the subject of waste, as understood in the English law, is bereft of many of its incidents on this side of the Atlantic.³⁹ It has been repeatedly decided that the requirements of a growing country, where tillage comes only after a clearing is effected, where there is a riotous abundance of timber, trees and tillable land, and where the customs of the people have all but crystallized into laws regarding the subject of husbandry, waste and its related topics must undergo considerable modification before they can be applied to our wants and to our conditions. The action, however, is well known in our jurisprudence and lies against a tenant by the curtesy, in dower, for life, or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do; or against such a tenant, who lets or grants his estate, and, still retaining possession thereof, commits waste without a like license.

a. *Action by heirs, devisee, or grantor of reversion.* An heir or devisee may maintain an action for waste, committed in the time of his ancestor or testator, as well as in his own time. The grantor of a reversion may maintain an action for waste, committed before he aliened the same.

³⁸ See 4 Kent's Com. 81, Add. Torts, 239; Taylor, Land. & Ten. sec. 349; Gibbons on Dilapidations, 108-128; Smith's Land. & Ten. 287.

³⁹ Drown v. Smith, 52 Me. 141; Findlay v. Smith, 6 Munf. 134; Kidd v. Dennison, 6 Barb. 9; Keeler v. Eastman, 11 Vt. 293.

b. *Id.; by ward against guardian.* Such an action may also be maintained against a guardian by his ward, either before or after the termination of his guardianship, for waste, committed upon the real property of the ward, during the guardianship.

c. *Id.; by grantee of real property sold under execution.* When real property is sold by virtue of an execution, the person, to whom a conveyance is executed pursuant to the sale, may maintain an action for waste, committed thereon after the sale, against the person who was then in possession of the property.

d. *Action against joint tenant or tenant in common.* An action for waste may also be maintained by a joint tenant or tenant in common, against his co-tenant, who commits waste upon the real property held in joint tenancy or in common. If the plaintiff recovers therein, he is entitled, at his election, either to a final judgment for treble damages, as specified in the last section, or to have partition of the property, as prescribed in the next two sections.

e. *View; when not necessary; when and how made.* In an action for waste, it is not necessary, either upon the execution of a writ of inquiry, or upon a trial of an issue in fact, that the jury, the judge, or the referee, should view the property. Where the trial is by a referee, or by the court without a jury, the referee or the judge may, in his discretion, view the property, and direct the attorneys for the parties to attend accordingly. In any other case, the court may, in its discretion, direct a view by the jury.⁴⁰

§ 168. **Injunction relief.** The object of the remedy by injunction, being to prevent a known and certain injury, is applicable to every species of waste.⁴¹ An injunction will, therefore, be granted to restrain equitable waste, which is defined to consist of such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed, for their manifest injury to the inheritance.⁴²

⁴⁰ N. Y. Code Civil Pro. sec. 1652
et seq. Consult *Bouton v. Thomas*,
 46 Hun, 6.

⁴¹ *Hawley v. Clowes*, 2 Johns. Ch.
 122.

⁴² 2 Story's Eq. Jur. sec. 915.

In one case the court laid down the following rule as to cases where courts of equity will interpose to prevent injuries to real estate — one which seems to be in conformity with the principles acted upon by courts in other States. If there is a privity of estate between the party applying for the injunction and him who is doing or about to do the act, such as exists between tenant for life or years and the reversioner, it is not necessary that the act should work irreparable injury to induce the court to grant it. But if the parties are strangers in respect to the estate, or are claimants adverse to each other, the court will require evidence that the injury threatened will be irreparable, before they will interpose to restrain it by injunction. And this, whether the act threatened be waste or trespass ⁴³ Nor will an injunction to stay waste be granted where the right is doubtful.⁴⁴

The perfect sanity that usually is supposed to accompany a judicial decision seems wanting in some cases involving the question of waste. If a mortgagor commits waste by removing buildings, wood, timber or other parts of the realty, can the mortgagee, out of possession, follow the property, after it has been severed from the realty, and maintain an action in the nature of trover against a person who buys of the mortgagor? It is a melancholy fact that some courts of last resort have been discovered that answer this question in the affirmative. The unfortunates that buy a load of wood in open market, of some chance farmer, under the delusive idea that after delivery and payment it is theirs, "are liable to an action of tort in the nature of trover against a person who buys of the mortgagor wood and timber, wrongfully cut, (sic?) by the latter from the mortgaged premises." This is the decision of the Massachusetts Supreme Court of Judicature.⁴⁵ If trover lies, why not replevin? The law invests a mortgagee with many privileges, he usually has the most ample security for his loan, in a form that is never liable to perish, he can invoke the process of the court at any instant that the mortgagor is in default, he is entitled to a receiver,

⁴³ *Georges Creek Co. v. Detmold*, 1 Md. Ch. Dec. 371; see *Atkins v. Chilson*, 7 Metc. 398; *Poindexter v. Henderson*, Walker, 176.

⁴⁴ *Storm v. Mann*, 4 Johns. Ch. 21; *Field v. Jackson*, 2 Dick. 599.

⁴⁵ *Searle v. Sawyer*, 127 Mass. 491, in the year A. D. 1878.

or an injunction, or an order of subrogation, by which his rights are guarded. The law fairly bristles with protective privileges but should there be no reciprocal obligations? Can he repose in absolute security and by his own gross negligence allow waste to be committed and then come upon the general public with reprisals on the ground that the mortgagor "wrongfully severed this particular wood from the premises?" How can the purchaser know that the severance is wrongful — by consulting the mortgagee? This is the only safe method — an abstract of title even would only disclose the presence of the mortgage — but there is nothing, even in that, to inform him that the mortgagor is committing waste by selling the products of the land.

The mortgagee is allowed to follow the timber in whatever shape it may have assumed into the possession of any innocent third party who has purchased for value and without notice, may lawfully seize it and devote it to his own purposes, leaving the innocent purchaser such remedies as he can find (none at all practically). Now there is a well known rule of equity to the effect that where one of two innocent parties must suffer the one whose negligence occasioned that injury must be that one. He is the party whose conduct, in the first instance, rendered the act possible by which the other has been defrauded. It is clearly the business of the mortgagee to know, either by personal or deputed inspection of the security, whether the creditor is committing or is likely to commit waste, and, whether he is in a position where he is likely, having the opportunity, to impose the fruits of waste upon the purchasing public. In such a case he can abundantly protect himself, and he should be held to some vigilance in conserving his own interests. The rule of the Massachusetts court is flatly repudiated in many jurisdictions, and it would seem that the doctrine of "*stare decisis*" should be made to yield to the interests of common equity.⁴⁶

We concede that somebody is being injured — that a remedy must exist — that the act complained of is waste. Our quarrel is with the remedy allowed in the Massachusetts decision to a mortgagee not in possession.

⁴⁶ Peterson v. Clark, 15 Johns. 205; Cooper v. Davis, 15 Conn. 556.

§ 169. **Resume of the rules governing the subject of waste.** It is afflictively apparent from the foregoing review of the principles that control the action of waste, that the entire topic has been made to wear an unnecessarily offensive aspect, through the constant tendency of text writers to expand and obscure the very plain and simple theory upon which the whole doctrine is bottomed. This same tendency to mystification is disclosed in many other departments of the law. But in this particular instance, it appears all the more aggravating in that the entire subject can be reduced to a very simple formula that will bear the criticism of any fair, reasonable test. I venture to affirm that this formula can be phrased as follows:

Whenever any person holding any interest, less than a fee simple, in any real estate, commits, or allows others to commit, any act palpably prejudicial to the inheritance, or which changes the form or character of the property, such person is liable to respond to the reversioner or remainderman in an action for waste, and he incurs the same liability when, by passive indifference and gross neglect, the property is exposed to unnecessary deterioration. There may be instances that this formula does not reach, but it is believed that they are unimportant and exceedingly rare, and for a sententious and easily memorized rule the foregoing is amply sufficient for practicable purposes. It is both difficult and dangerous to formulate legal principles in the mold of proverbs. They are scant covers for very great things. Still it would seem desirable to rid ourselves of the black letter lore that has encrusted the subject by adopting some simpler method even if that method in its turn is open to objection.

CHAPTER XI.

FRANCHISES AND CHARTER RIGHTS.

SEC. 170. Nature and definition.

171. Distinction between "charter" and "franchise."
 - a. Views of Mr. Justice Orton in a recent case
172. What passes with the grant of franchise.
173. Construed in favor of the public, not in favor of the grantee.
174. Regarded as an irrevocable contract.
175. Synoptical review of *Dartmouth College v. Woodward*.
176. The power to repeal examined.
177. Lease or sale of franchise generally void.
178. Railway franchises from a judicial point of view.
179. Subject to the right of eminent domain.
180. How lost or forfeited.
 - a. Views of Justice Finch in a celebrated case.

§ 170. **Definition and nature.** Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State.¹

It is quite too narrow a definition of the word "franchise," to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise.²

Mr. Justice Field said, in *Morgan v. Louisiana*, 93 U. S. 217, 223 (1876): "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used synonymous with rights, privileges and immunities, though

¹ *The Bank of Augusta v. Earle*,
13 Pet. 519.

² *Atlantic & Gulf R. R. Co. v. State of Georgia*, 98 U. S. 359.

of a personal and temporary character, so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon the transfer of franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth or gravel, for the bed of its road, or water for its engines or the like. They are positive rights or privileges without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them.³ The term 'franchise' has several significations and there is some confusion in its use. The better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant."⁴

"If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority from the sovereign power, it would seem to me that such immunities and privileges must be franchises."⁵

He who says the State has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the State, as the representative of the public, from according the same right to another.⁶

³ Approved in *Chesapeake & Ohio R. Co. v. Miller*, 114 U. S. 185 (1884).

⁴ *City of Bridgeport v. New York, etc.*, R. Co. 36 Conn. 266.

⁵ *Spencer, J., in People v. Utica Ins. Co.* 15 Johns. (N. Y.) 387.

⁶ *Jackson County Horse R. Co. v.*

Interstate Rapid Transit R. Co. 24 Fed. Rep. 306; *Stoubridge Canal Proprs. v. Wheeley*, 2 Barn. & Ad. 793; see also *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 422, 9 L. ed. 775.

When the legislature grants a franchise it only intends to grant that of which it has knowledge.⁷

"We have nothing to do with a great proportion of the franchises that occupy a large space in the treatises on English law; and whoever claims an exclusive privilege with us, must show a grant from the legislature. Corporations, or bodies politic, are the most usual franchises known in our law; and they have been sufficiently considered in a former volume. These incorporated franchises seem, indeed, with some impropriety, to be classed by writers among hereditaments, since they have no inheritable quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by the charter, is supposed never to die, but to be clothed with a kind of legal immortality. (a). They are, nevertheless, deemed incorporeal hereditaments; and shares in a railroad incorporated company have, in Kentucky, been adjudged to be real estate, which descends as realty, and of which a widow might be endowed.⁸ Special privileges, conferred upon towns and individuals in a variety of ways, and for numerous purposes, having a connection with the public interest, are franchises."⁹

§ 171. Distinction between "charter" and "franchise." Let us clear up a mystification by a further resort to definitions, and avoid the common error of confounding the instrument called a charter with the thing called a corporate franchise. Now a charter is merely the written or printed evidence of a public grant; while the franchise is the specific thing granted or obtained by grant from the legislature. It has many of the attributes of property. It is a privilege conferred by the sovereign power upon natural or artificial persons, enabling them to exercise functions and acquire rights which otherwise it would be unlawful for them to assume. Its source is in the government, and it always traces its gene-

⁷ Bridge Proprs. of P. & H. Rivers v. Hoboken L. & Imp. Co. 68 U. S. (1 Wall.) 116, L. ed. 571; see also Mohawk Bridge Co. v. Utica & S. R. Co. 6 Paige, 564, 3 L. ed. 1104; Thompson v. New York & H. R. Co. 3 Sandf. Ch. 625, 7 L. ed. 980;

McRee v. Wilmington & R. R. Co. 47 N. C. 186; Saginaw Gas L. Co. v. Saginaw, 28 Fed. Rep. 529.

⁸ Price v. Price, 6 Dana's Rep. 107.

⁹ 3 Kent's Com. 619.

sis to a grant or to the doctrine of prescription, which is the supposition of the grant.¹⁰ Take the interest which a street railway has in the line of its track. Its franchise, in strict language, is embraced in its right to lay its track along a certain avenue on the condition of running public cars over the same.¹¹ The great case of *Dartmouth College v. Woodward*, 17 U. S. 518, has declared that this franchise is within the special protection of those constitutional provisions which prohibit the impairment of contractual obligations, and consequently these rights cannot be arbitrarily annulled. It does not follow, however, that a franchise, whether granted for a railway, turnpike, plank road, bridge, or ferry is, in its nature exclusive—that it imports for all time an absolute monopoly of the rights conferred. On the contrary, a formidable array of authority will support the proposition that the State may grant a similar franchise to other parties, who may, in the exercise of the rights granted, seriously impair the value of the privileges first granted.¹² The Supreme Court of Illinois, in *Chicago City Ry. Co. v. People*, 73 Ill. 541, 548 (1874), said: “It is a misconception of the law to suppose the railway company derives its power to construct a railroad from any ordinance of the city. All its authority is from the State, and is conferred by its charter. The city has delegated to it the power to say in what manner and upon what conditions the company may exercise the franchise conferred by the State, but nothing more.”

A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its

¹⁰ *Oakland R. R. Co. v. Brooklyn Co.* 45 Cal. 365.

¹¹ *N. Y. & H. R. R. Co. v. Forty-Second Street Co.* 50 Barb. 285.

¹² *Baltimore Pass. Ry. Co. v. North Ave. Co.* 23 Atl. Rep. (Md.) 466; *Desmoine's Street Ry. Co. v.*

Broad Gauge Street Ry. Co. 73 Iowa, 513; *Birmingham Street Ry. Co. v. Birmingham Street Ry. Co.* 79 Ala. 465; *Street Ry. Co. v. West Side Street Ry. Co.* 48 Mich. 433; *Canal R. R. Co. v. Crescent City R. R. Co.* 41 La. An. 561.

authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly.¹³ For the purposes of federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive.¹⁴

There is no reason why several States cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. The Philadelphia, Wilmington and Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland (10 How. 392), Chief Justice Taney, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the States of Maryland, Delaware and Pennsylvania, and which, by corresponding laws of the respective States, were united together and form one corporation, under the name and style of the Philadelphia, Wilmington and Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore." He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created.

It is well settled that corporations of one State may exercise their faculties in another, so far, and on such terms, and to such extent as may be permitted by the latter.¹⁵

a. *Views of Mr. Justice Orton in a recent case.* From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though

¹³ *Lafayette Ins. Co. v. French*, 18 How. 405.

¹⁴ *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 2 How. 497; *Marshall v. The Baltimore & Ohio Railroad Co.* 16 Id. 329; *Ohio*

& *Mississippi R. R. Co. v. Wheeler*, 1 Black, 297.

¹⁵ *Blackstone Manufacturing Co. v. Inhabitants, etc.* 13 Gray, 489; *Bank of Augusta v. Earle*, 13 Pet. 588.

artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary co-partnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity.¹⁶ A share of the capital stock of a corporation is defined to be a right to partake, according to its amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted.¹⁷ The corporation is the trustee for the management of the property, and the stockholders are the mere *cestuis que trust*.¹⁸ The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts.¹⁹ The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation.²⁰ The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division

¹⁶ Ang. & A. on Corp. secs. 40, 46, 100, 591, 595.

¹⁷ Id. sec. 557.

¹⁸ Gray v. Portland Bank, 3 Mass. 365; Eidman v. Bowman, 4 Am. Corp. Cas. 350.

¹⁹ Ang. & A. on Corp. sec. 191;

Pope v. Brandon, 3 Stewart (Ala.), 401; Whitwell v. Warner, 20 Vt. 444.

²⁰ Bradley v. Holdsworth, 3 Mees. & W. 422; Waltham Bank v. Waltham, 10 Metc. 334; Tippetts v. Walker, 4 Mass. 595.

is made by the directors or other proper officers of the corporation, or by judicial determination.²¹ A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same.²² A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder.²³

These general principles sufficiently established the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do.

It is said in *Utica v. Churchill*, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in *Hyatt v. Allen*, *supra*, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona & St. P. R. R. Co. v. St. P. & S. C. R. R. Co.*, 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial

²¹ Ang. & A. on Corp. sec. 160, 190.
557; *Hyatt v. Allen*, 4 Am. Corp.
Cas. 624.

²² *Wilde v. Jenkins*, 4 Paige, 481.

²³ Ang. & A. on Corp. sec. 779a.

interest in its rights, property, and immunities. In *Baldwin v. Canfield*, 26 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same.²⁴

The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the incorporators; while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises.²⁵

The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment. "The franchise to be a corporation," said Hoar J., in *Commonwealth v. Smith*, 10 Allen (Mass.), 448-455, "clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible." In *Hall v. Sullivan R. R. Co.*, 21 Law Rep. 138; 2 Redf. Rail. Cas. 621; 1 Brunner, Collected Cases, 613, Mr. Justice Curtis said: "The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected."

§ 172. What passes with the grant of franchise. The grant of the franchise carries with it a grant of everything necessary to give it beneficial effect.²⁶

A power to pledge the franchises and rights of a corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise and upon which its real value depends.²⁷

²⁴ Orton, J., in *Button v. Hoffman*, 61 Wis. 20.

²⁵ *Memphis & Little Rock Railroad Co. v. Berry*, 112 U. S. 609.

²⁶ *Cooley*, Const. Lim. 64; U. S. v. Fisher, 2 Cranch, 358; *McCulloch*

v. Md. 4 Wheat. 428; *Fletcher v. Oliver*, 25 Ark. 289; *Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *Morawetz, Corp. sec. 194.*

²⁷ *Phillips v. Winslow*, 18 B. Mon. 431

§ 173. Construed in favor of the public, not in favor of the grantee. By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention on the part of the government, to grant private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee, and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms.²⁸ This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the Legislature or of any public authority.²⁹

§ 174. Regarded as an irrevocable contract. Where franchises are granted to a municipal corporation this grant cannot be revoked, nor the property nor rights conferred by it in any way divested by the State.³⁰ The doctrine has been adopted in the Supreme Judicial Court of Massachusetts, in the case in which the charter of an early railroad company contained a provision that no other railroad than the one thereby granted should, within thirty years after the passage of the Act, be authorized to be made upon the same route. Charters were subsequently granted by the Legislature to several railroad corporations, which together authorized a line of railroad nearly corresponding with the plaintiff's road.

²⁸ *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 544-548; *Dubuque & P. R. Co. v. Litchfield*, 64 U. S. (23 How.) 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438.

²⁹ *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 26, 27.

³⁰ *Pawlet v. Clark*, 9 Cranch, 292; *Dartmouth v. Woodward*, 4 Wheat. 518; *Bailey v. Mayor of New York*, 3 Hill, 531.

The court, after hearing an elaborate argument, and by a carefully prepared opinion by the late Chief Justice Shaw, decided in favor of the plaintiff's claim to an exclusive right, and gave judgment for an injunction against operating the defendant's road.³¹

The Dartmouth College Case settled the general doctrine that legislative charters like legislative grants of land, are contracts within the meaning of the Federal Constitution. That decision was pronounced in 1819, and has been followed by all the American courts except Ohio, and the courts of Ohio have been reversed by the U. S. Supreme Court.³²

In the more recent case in the Supreme Court of the United States of *Bank v. Knoop*, 16 How. 369, Justice McLean, speaking for a majority of that court, held this language:

"Every valuable privilege given by the charter and which conduced to an acceptance of it, and an organization under it, is a contract which cannot be changed by the Legislature where the power to do so is not reserved in the charter."

In the more recent case of *The Bridge Proprietors v. Hoboken Co.*, 1 Wall. 144 (68 U. S., 17 L. ed. 571), this question seems to be put at rest.³³

§ 175. **Synoptical review of "Dartmouth College v. Woodward."** The decision in this celebrated case reposes upon the following facts: In 1769 the British Crown, at the in-

³¹ Boston & Lowell R. R. Corp. v. The Salem & Lowell R. R. Co. 2 Gray, 33, 34.

³² Ang. & Ames, Corp. secs. 31, 469, 767; Dartmouth College v. Woodward, 4 Wheat. 518; East Hartford v. Hartford Bridge Co. 17 Conn. 93; McLaren v. Pennington, 1 Paige, 102; 2 Kent's Com. 305, 306; University of Maryland v. Williams, 9 Gill & J. 402; Aberdeen Academy v. Mayor of Aberdeen, 13 Sm. & M. 645; Young v. Harrison, 6 Ga. 130; Bush v. Shipman, 4 Scam. 190; State v. Hayw. 3 Rich. (S. C.) 389; Baily v. Railroad Co. 4 Har. (Del.)

389; Michigan Bank v. Hastings, 1 Doug. (Mich.) 225; B. & L. R. R. v. Salem & Lowell R. R. 2 Gray, 1; Aurora & Lau. Turnpike Co. v. Holthouse, 7 Port. (Ind.) 59; Louisville v. University of Louisville, 15 B. Mon. 642; Yarmouth v. N. Yarmouth, 34 Me. 411; Bank of Penn. v. Commonwealth, 19 Pa. 151; Iron City Bank v. Pittsburg, 27 Id. 340; 2 Wash. Real Prop. 22, sec. 10; Bank of Pa. v. Commonwealth, 19 Pa. 151.

³³ Hathorne v. Calef, 2 Wall. 10 (69 U. S., L. ed. 776).

stance of Lord Dartmouth and the Marquis of Bute, granted certain charter rights of considerable value to the trustees of Dartmouth College in the then province of Hampshire. Under this royal grant the trustees originally named, and their duly elected successors, prosperously administered the affairs of the institution for nearly half a century. In the autumn of 1816, the Legislature of New Hampshire — then a sovereign State of the American Union — passed a law enlarging the number of trustees, prescribing the mode of their appointment, and subordinating their action to an appellate board of overseers, and making other important restrictions on the original charter. The old board strenuously resisted the operation of this act, while the new corporation, as the duly authorized trustees of Dartmouth University, signalized their authority by taking wholesale possession of everything belonging to the college. The old trustees resorted to an action of trover against the treasurer to recover possession of the books, papers, and muniments of title which had been unlawfully seized, and the sole question raised, or at least argued, was whether upon this state of facts the legislative enactment of 1816 contravened the prohibitions of the Federal Constitution relating to the obligations of contracts. The New Hampshire Supreme Court, fully aware of the importance of the question involved, debated long and seriously over the arguments submitted to their consideration, but finally sustained the law on the theory that the State has the exclusive control of trust property situate within its jurisdiction, and may legislate in any way it sees fit with reference to the same. On appeal to the Supreme Court of the United States, Daniel Webster appeared as counsel for the old board of trustees, and the ruling of the New Hampshire Court was utterly overthrown, and the principle firmly established that a charter is a contract, and as such must be respected. "It is contrary to the first principles of the social compact, and to every principle of sound legislation to allow contractual obligations solemnly entered into, and legally acted upon, to be set aside on the mere whim or caprice of a State Legislature." The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden

changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding." The decision becomes of great importance in considering the subject of franchise, and it may always be invoked wherever a disposition is manifested to impair the rights granted under a legislative franchise by subsequent restrictive legislation regarding the rights so granted.³⁴

§ 176. The power to repeal examined. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done, under power lawfully conferred.³⁵

The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a Legislature to effect a destruction of the corporate life and disable it from continuing its corporate business.³⁶ And a reservation of the right to alter and amend confers powers to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contract.³⁷ We think no well considered case has gone further than this, while, in many cases, such power has been expressly held to be limited to the effect stated.

In the language of Chief Justice Marshall in *Fletcher v. Peck*, 10 U. S. (6 Cranch. 135); 3 L. ed. 162: "If an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates; and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact,

³⁴ See Const. art. 1, sec. 10.

³⁵ *Butler v. Palmer*, 1 Hill, 335.

³⁶ *People v. B. & A. R. R. Co.* 40

N. Y. 569; *Phillips v. Wickham*, 1 Paige, 590.

³⁷ *Munn v. Ill.* 94 U. S. 123 (24 L. ed. 83).

and cannot cease to be a fact. When, then, a law is in the nature of a contract, a repeal of the law cannot divest those rights." It would seem to be quite obvious that a power existing in the Legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens, beyond the scope of express constitutional power.

Since the decision of the celebrated Dartmouth College Case, 17 U. S. (4 Wheat. 518); 4 L. ed. 629, the doctrine that a grant of corporate powers by the sovereign to an association of individuals for public use constitutes a contract within the meaning of the Federal Constitution prohibiting State Legislatures from passing laws impairing its obligations, has, although sometimes criticized, been uniformly acquiesced in by the courts of the several States as the law of the land, and may be regarded as too firmly established to admit of successful question or dispute.

The intimation by Judge Story in that case that the rule might be otherwise if the Legislature should reserve the power of amending or repealing it, led to the adoption, by the Legislatures of the various States, of the practice of incorporating such reservations in acts of incorporation. Whatever may be the effect of such reservations it is immaterial whether they are embraced in the act of incorporation or in general statutes or provisions of the Constitution. In either case, they operate upon the contract according to the language of the reservation.³⁸

It is manifest, therefore, that in the absence of such reserved power, Legislatures have no authority to violate, destroy or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not in any sense constitute a condition of the grant, and cannot have effect as such but is simply a power to put an end to the con-

³⁸ 1 Morawetz Pri. Corp. sec. 464.

tract, with such effect upon the rights of the parties thereto as the law ascribes to it.³⁹

In speaking of the exercise of this power by Congress in the Sinking Fund Cases, Chief Justice Waite says: "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. * * * Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In doing so it cannot undo what has already been done, and it cannot unmake contracts that have been already made; but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted."

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: "The reserved power in question is simply that of legislation to alter, amend or repeal a charter. This is very different from the real power to violate or to alter the

³⁹ Sinking Fund Cases, 99 U. S. 748; *Tomlinson v. Jessup*, 82 U. S. (15 Wall.) 457.

terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract, it is not sustainable."

This dissent proceeded upon the ground that the Acts of Congress under consideration changed some of the essential features of the contract, and were therefore void as being obnoxious to the provisions of the Constitution for the protection of lives, liberty and property. The majority of the court held, however, that such acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the Constitution.

An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument and beyond the power of parties lawfully to create. If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the Legislature, of power to take away or destroy property lawfully acquired or created under authority conferred by charter, would necessarily violate the fundamental law, and be void, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void.

In *People v. National Trust Company*, 31 N. Y. 287, the question was raised that a dissolved corporation was discharged

from the obligation to pay rent accruing upon a lease subsequent to its dissolution. Judge Rapallo said: "This denial is not founded upon the allegation of any payment, release or surrender, or anything affecting the merits of the claim, but upon the sole ground that by the dissolution of the corporation the lease was terminated, and the covenant to pay rent ceased to be obligatory. We do not regard the dissolution as having any such effect. Under the statutes of this State, on the dissolution of a corporation its assets become a trust fund for the payment of its debts; and these include debts to mature, as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or cancelled."

In *Commonwealth v. Essex Company*, 13 Gray (Mass), 239, Justice Shaw said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."⁴⁰

The case of *Detroit v. Detroit Plank Road Company*, 43 Mich. 140, is not only in point, but entitled to high consideration, on account of the distinction as a constitutional lawyer attained by the learned judge who wrote the opinion of the court. The question was whether the Legislature had power to compel the defendant to remove its toll gates from within the city limits after they had been lawfully placed there under the provisions of its charter. Judge Cooley said: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may have rightfully acquired. This is the most arbitrary tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired — whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the State; it is enough that it has become private property, and it is thus protected by the law of the land."

⁴⁰ See *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

The New York Court of Appeals in the case of *Miner v. New York Central & H. R. R. Co.*, 123 N. Y. 242, applied the same principle in a condemnation case. A railway corporation was organized with a life of fifty years. It condemned a right of way across the lands in question. Subsequently it became consolidated with other railroad companies, who took and acquired all its rights, property, and franchises. An action of ejectment was brought to recover the right of way which had been condemned, the life of the corporation which condemned it having expired. It was held that the condemnation of the easement was, in the very nature of the transaction, intended to be a permanent appropriation of the right of way for railroad purposes, and that the easement thus appropriated was not limited to the life of the corporation.

§ 177. **Lease or sale of franchise generally void.** It has been repeatedly adjudged in the United States Supreme Court that a lease made by one railroad corporation to another, either of which is not expressly authorized by law to enter into a lease, is *ultra vires* and void.⁴¹

But while the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation, yet whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. Accordingly, when the charter of a railroad corporation, or the general laws applicable to it, manifest the intention of the Legislature, for the purpose of securing a continuous line of transportation of which its road forms part, to confer upon it the power of making contracts with other railroad or steamboat corporations to promote that end, such contracts are not *ultra vires*.⁴²

⁴¹ *Thomas v. West Jersey R. Co.* 101 U. S. 71 (25: 950); *Pa. R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 630 (30: 83, 284); *Oregon R. Co. v. Oregonian R. Co.* 130 U. S. 1 (32: 837).

⁴² *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 98 (27: 413); see also *Branch v. Jesup*, 106 U. S. 468, 478 (27: 279, 282).

Nor can a railroad company, without due authority, sell its real property acquired by the right of eminent domain, or necessary for the transaction of the business for which it was incorporated and given its extraordinary powers. So a railroad company cannot, without legislative sanction, sell its franchise to operate and maintain its road to some rival organization, under the guise of a so-called lease.⁴³ But after the roadbed is constructed and the line in running order, the corporation may alienate things requisite for its operation, which are regarded not as constituting a part of its real estate but as personal property, such as engines, rolling stock and the like; and such property is liable to levy and sale on execution for its debts.⁴⁴

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of everyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the Legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another cor-

⁴³ *Rollins v. Clay*, 33 Me. 132 (1851); *Middlesex R. R. Co. v. Boston & Chelsea R. R. Co.* 115 Mass. 347; *Fietsam v. Hay*, 122 Ill. 293; *Commonwealth v. Smith*, 10 Allen

(Mass.) 448; *Pierce on Railroads*, p. 496; *Coe v. Columbus, Piqua & Indiana R. R. Co.* 10 Ohio St. 372.

⁴⁴ *Coe v. Columbus, Piqua & Indiana R. R. Co.* 10 Ohio St. 372.

poration. These principles apply equally to companies incorporated by special charter from the Legislature, and to those formed by articles of association under general laws.⁴⁵

§ 178. **Railway franchises from a judicial point of view.** Railway corporations are mere creatures of the State engaged in doing a public business, and are bound by any reasonable statutes for the regulation of this business which the legislative power chooses to impose.⁴⁶

These corporations are *quasi* public agencies, and perform a public duty. They are agencies created by the State with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced.⁴⁷ An agreement by which a railway corporation undertakes, without the consent of the State, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy.⁴⁸ Among the obligations imposed upon a railway corporation is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the diligence and care with which it furnishes and operates its road is, to that extent, against public policy.

In *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 409, Beasely, C. J., used the following language:

"In my opinion a railroad company constituted under statutory authority is not only by force of its inherent nature a common carrier, as was held in the case of *Palmer v. Grand Function Railway*, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use

⁴⁵ *Central Trans. Co. v. Pullman's Palace Car Co.* 139 U. S. 24.

⁴⁶ *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Budd v. N. Y.* 143 U. S. 517; *Atty.-Genl. v. B. & A. R. R. Co.* 160 Mass. 62; *Georgia R. & B. Co. v. Smith*, 128.

⁴⁷ *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 609; 15 Am. Rep. 357.

⁴⁸ *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although, in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such, they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended that in the exercise of them, it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede that, when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. I think they are unalterably parts of the supreme authority; and in whatsoever hands they may be found, they must be considered as such. In the use of such franchises, all citizens have an equal interest and equal rights and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be sued as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants — they are to be held as a quasi-public trust for the benefit, at least to a considerable degree of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents; and the consequence is they must, in the exercise of their calling, observe to all men a perfect impartiality."

§ 179. **Subject to the right of eminent domain.** We shall have occasion further on to critically examine the legal and equitable principles that underlie the right of eminent domain. It will suffice in this immediate connection to observe that the public necessities must always be regarded as superior to any mere private claim however that claim may have originated. A franchise granted by express legislative sanction is invested with no sacramental character, and claims

under it must yield to the right of eminent domain.⁴⁹ The exercise of this right, however, always involves just and full payment for whatever appropriation is made. This is a strict rule emanating from the organic law. A franchise imports many privileges. For instance, it is not ordinarily subject to levy and sale on execution unless by force of some particular statute.⁵⁰ But any or all of these privileges must yield wherever public necessity or even expediency demands it.

To a certain extent a ferry franchise is property not subject to interference by others.⁵¹ But as between the public and the owner of the franchise the license to keep a ferry confers a privilege only, subject to modification or revocation when the public interest so requires. There is no contract between the public and the licensee, and no property in the privilege, such as will prohibit a revocation of the license without a forfeiture judicially found, or the taking for the public use without the exercise of the right of eminent domain.⁵² A lawful construction of a railway over a street, or of a bridge over a river, though likely to decrease the receipts of a ferry, is not injury to private property in the ferry franchise within the intendment of the Constitution.⁵³

A mere franchise is not taxable. A railroad company has a franchise to construct and maintain a railroad. Its franchise cannot be taxed, but its roadbed and other structures can be as real estate. And generally it may be said that an incorporeal hereditament of any kind is not taxable.⁵⁴

§ 180. How lost or forfeited. Non-user of its franchises by a corporation is ground for dissolution and forfeiture of its charter at the instance of the State; but until sentence of dissolution has been pronounced by a court of competent jurisdiction, in a proper proceeding instituted for the purpose, the

⁴⁹ *Bonaparte v. Camden, etc., R. R. Co.* 1 Bald. 265; *N. Y. etc., R. R. Co. v. Boston R. R.*, 36 Conn. 196.

⁵⁰ *Philadelphia, etc., R. R. Co.'s* App. 70 Pa. St. 355.

⁵¹ See *Golconda v. Field*, 108 Ill. 419.

⁵² *Sullivan v. Lafayette Co. Supervisors*, 58 Miss. 790.

⁵³ *Pittsburg & Lake Erie R. R. Co. v. Jones*, 3 East. Rep. (Pa.) 619; 8 Wait's Act. & Def. 263.

⁵⁴ *DeWitt v. Hayes*, 2 Cal. 468; *Smith v. The Mayor*, 68 N. Y. 552.

corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose by the State granting it. Until dissolution has been thus judicially pronounced, neither the existence of the corporation nor its title to its property can be questioned collaterally.

In making these observations the Supreme Court of Tennessee, in *Parker et al v. Bethel Hotel Company et al*, 34 S. W. Rep. 209, determines that the facts that a corporation disposed of that part of its property which was necessary to carry on its business, and never thereafter elected directors or otherwise exercised its corporate powers, and that one person acquired ownership of all the stock, do not dissolve the corporation.

It probably would not be competent for a debtor of the corporation, when sued, to set up by way of defense that the charter of the corporation was forfeited, unless the forfeiture had been established by the judgment of this court.⁵⁵ That is a matter to be judicially tried and determined, and not to be inquired into collaterally. Where a charter imposes the duty of making stated returns of the expenditures and profits, the government alone can enforce a forfeiture for a neglect of the duty.⁵⁶

In the case of the *Bear Camp River Co. v. Woodman*, 2 Greenl. 404, the charter was to become void if, at the end of one year, the river should not be cleared of certain obstructions. In an action of assumpsit to recover tolls of the defendant, he offered to prove that the removal of the obstructions had never been effected; but the evidence was rejected at the trial, and the ruling was held to be correct. This case affords a strong illustration of the necessity of specific judicial proceedings for the purpose of causing the charter to be declared forfeited. And in the case before us, we think that by the omission to lay the accounts before the Legislature, the corporation did not, *ipso facto*, cease to exist, but the proceedings must have been instituted to establish the fact that

⁵⁵ *Chester Glass Co. v. Dewey*, 16 Mass. 102; *Bank of Niagara v. Johnson*, 8 Wend. 645; *The People v. The Manhattan Co.* 9 Id. 382.

⁵⁶ *Peirce v. Somersworth*, 10 N. H. Rep. 369; *The State v. Carr*, 5 N. H. Rep. 367.

the penalty of forfeiture was incurred.⁵⁷ A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution cannot legally exercise the powers they affect to use.

Chancellor Kent says that he believes there is no instance of calling in question the right of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government.⁵⁸ In *The People v. The Manhattan Co.*, 9 Wend. 382, Mr. Justice Sutherland says: "Where the corporation expires by lapse of time it may be otherwise, and in such case only." A corporation may forfeit its franchises for misfeasance, but the information for that purpose must be presented under the authority of the State, which must be a party to the suit and a party to the judgment for the seizure of the franchise.⁵⁹

a. *Views of Mr. Justice Finch in a celebrated case.* One of the most remarkable cases decided in recent times, which directly affects the topic now under review, is that of *The People v. North River Sugar Refining Co.*, 121 N. Y. 582. The action was brought by the attorney-general to have the defendant "dissolved, its charter vacated, and its corporate existence annulled" on the ground that it had grossly abused its franchise privileges by entering into a compact or so-called trust with divers other corporations, the purposes of which were illegal, and the effect of which was a gross perversion of the privileges originally granted. The magnitude of the interests involved in this litigation, the eminence of the counsel employed, and the exceptional ability of the judge who voiced the opinion of the New York Court of Appeals, have all contributed to invest this case with phenomenal interest and impart to the decision a degree of value rarely found even among the opinions of this justly celebrated court. From that opinion I shall make extended extracts as affording apt illustration of the present attitude of our judi-

⁵⁷ *Rex v. Pasmore*, 3 T. R. 244.

⁵⁸ *Slee v. Boom*, 5 Johns. Ch. 381.

⁵⁹ *The Commonwealth v. Union Ins. Co.* 5 Mass. 230; *Rex v. Amery*,

2 T. R. 515; *Vernon Society v.*

Hills, 6 Cowen (N. J.), 23; *State v.*

Turnpike, 15 N. H. 162. 1844. Opinion by Gilchrist, J.

ciary upon the subject of franchises, and the abuse of the privileges they confer.

“The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the Legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but it is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

It appears to be settled that the State as prosecutor must show on the part of the corporation accused some sin against the law of its being, which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted all mischief ends and all harm is averted. But where the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty.

In *Thompson v. People*, 23 Wend. 583, the ground of forfeiture was tersely described as ‘some misdemeanor in the trust injurious to the public;’ and as recently as the case of *Leslie v. Lorillard*, 110 N. Y. 531, we said: ‘In the granting of charters the Legislature is presumed to have had in view

the public interest; and public policy is concerned in the restriction of corporations within chartered limits; and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public."

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it has passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master, it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed 'over production.' In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is in substance and effect a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people, over balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a

violation of law for corporations to enter into a partnership.⁶⁰ The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied.

Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is, what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corpo-

⁶⁰ N. Y. & S. C. Co. v. F. Bank, 7 1 Wall. 29; Whittenton Mills v. Wend. 412; Clearwater v. Meredith, Upton, 10 Gray (Mass.) 596.

rators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively as an aggregate body, without the least exception, and, so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in *People ex rel. v. K. & M. T. R. Co.*, 23 Wend. 193, 'though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court.'"

CHAPTER XII.

EASEMENTS AND SERVITUDES.

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§ 181. **Preliminary.** I have previously referred to the classification of hereditaments into corporeal and incorporeal. The first comprise tangible things, visible objects, such as lands, and incidental annexations to lands, while the term "incorporeal hereditaments" imports such interests connected with land as are held by persons who are not the proprietors of the fee. The complexities that surround this subject in the English law, are with us, very much simplified. Blackstone tabulates eleven distinct grades of incorporeal hereditaments. But this formidable array all but vanishes under the liberalizing tendency of our American law. Offices, dignities, pensions, corodies, advowsons, tithes, and annuities are all subjects with which our law of real property has no legitimate concern. Rents we have already considered; commons, with us, form a very restricted topic, leaving "franchises" and "ways" only, as topics for further elaboration. Custom and usage, with us, sanctions a description of these incorporeal hereditaments under the general head of *easements*.

§ 182. **Definitions and nature.** Easements. The elementary definition of an easement is "a liberty, privilege or advantage in land without profit distinct from an ownership in the soil," so that the use of the word "privilege" appropriately

designates the conveyance of an easement as distinguished from a grant of the soil itself.¹

Easements include all those privileges which the public or the owner of neighboring lands or tenements has in the land of another, and by which the "servient owner upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do something on his own land, for the advantage of the public or for the "dominant owner" to whom the privilege belongs.² They are created by grant, express or implied, and by prescription. They do not change with the persons, and any infraction of the rights involved may be remedied by injunctive relief or abatement. They may be extinguished by non-user for a period of twenty years, by release or merger, necessity or abandonment.³ They may and usually do exist with reference to light, air, water, right of way, right of support, and in party walls and fences, and have been classified as public, private, appendant, continuous, affirmative, and negative.⁴ There are also easements of convenience and necessity. But they have none of the attributes of a tenancy.⁵ They should not be confounded with rights of property or ownership or with profits "*à prendre*" and they differ from mere licenses, which are usually personal. An easement is affirmative when it entitles the dominant owner to make active use of the servient tenement, or to do some act which in the absence of the easement would make the act a trespass. Similarly an easement is negative when it merely restrains the servient from exercising the ordinary rights of ownership over his land.⁶

The rights of any party having an easement in the land of another are measured and defined by the manifest purposes and general character of the easement itself. For legal purposes consistent with the character and scope of the privilege granted, the rights of the owner of the fee must be respected, but, on the other hand, such owner must so comport himself as not to interfere with the just exercise of the rights that properly pertain to the easement previously granted.⁷

¹ Jamaica Pond Aqueduct Corporation v. Chandler, 91 Mass. 159.

² Pierce v. Keator, 70 N. Y. 421.

³ Sanderlin v. Baxter, 76 Va. 305.

⁴ Gale on Easements, 23.

⁵ Swift v. Goodrich, 70 Cal. 106.

⁶ Gale on Easements, 24.

⁷ Phipps v. Johnson, 99 Mass. 26.

Mr. Boone says that although easements are imposed upon corporeal property, they confer no right to a participation in the profits arising from such property.⁸ In this respect they are to be distinguished from what are called "profits *à prendre*," which consist of a right to take the fruit or products of the land, or the materials which compose it.⁹

The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly; it cannot be established by intendment or presumption.¹⁰

If the owner of an easement has made or permitted erections which substantially intercept the air, light, and vision to and from his lot, the easement is thereby extinguished.¹¹

In speaking of this question on easements, in *Merritt v. Parker*, 1 N. J. L. 460, the chief justice said: "No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury. In the light, therefore, in which we view this subject, whether the drawing of the water from the pond by means of a trench, or the causing an additional quantity of water to flow through the lands of the defendant, was productive of benefit or injury, are, in my opinion, questions into which we have no right to examine." In *Dickenson v. Grand Function Canal Co.*, 15 Beav. 260, it was said: "If the plaintiffs have purchased from the company a right to preserve the waters in the rivers Belbourne and Gade from being diverted in any manner * * * it is no answer to them to say that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated." In *Johnston v.*

⁸ Boone, Real Prop. sec. 135. Citing *Hewlins v. Shippam*, 5 Barn. & C. 221; *Wagner v. Hanna*, 38 Cal. 116; *Wolfe v. Frost*, 4 Sand. Ch. 72; *Bowen v. Team*, 6 Rich. 298.

⁹ Citing *Waters v. Lilley*, 4 Pick. 145; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Tinicum Fishing*

Co. v. Carter, 61 Pa. St. 39; *Hill v. Lord*, 48 Me. 99; *Bland v. Lipscombe*, 30 Eng. L. & Eq. 189; *Huff v. McCauley*, 53 Pa. St. 209; *Manning v. Wasdale*, 5 Ad. & E. 758.

¹⁰ *Polson v. Ingram*, 22 S. C. 541.

¹¹ *Lattimer v. Livermore*, 72 N. Y. 174.

Hyde, 32 N. J. Eq. 455, where the owner of the servient estate attempted to substitute a covered way for an open ditch, the court said it could not compel Mr. Hyde to accept the substitution of a covered aqueduct for an open raceway. The same doctrine has been emphatically announced in *Gregory v. Nelson*, 41 Cal. 278. The action was brought to restrain the defendants from destroying plaintiff's water ditch by their mining operations upon a claim across which the ditch ran. Plaintiff's title to the water ditch rested upon his right by prescription. The court found in favor of plaintiff's title, but permitted defendants to proceed with their mining operations, provided they would construct a metal pipe at this point of sufficient capacity to carry the water in lieu of such ditch. In referring to this portion of the judgment the court said: "It knew of no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience or necessities of another private party. It is the duty of courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property or to compel the owner to exchange the same for other property, to answer private purposes or necessities." If the owner of the servient estate is not allowed to materially alter the character of the servitude, although such alteration would not result in damage to the dominant estate, but might be a benefit thereto, we see no reason why the same principle would not apply to the owner of the dominant estate in making material alterations in the character of his easement.

Section 806 of the California Civil Code provides: "The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired;" and it appears to be settled doctrine that both parties have the right to insist that so long as the easement is enjoyed it shall remain substantially the same as it was at the time the right accrued, entirely regardless of the question as to the relative benefit and damage that would ensue to the parties by reason of a change in the mode and manner of its enjoyment. Defendant's title rests upon a right by prescription, an implied grant which limits and defines defendant's rights

as fully and as strictly as though the grant were express; and for the purpose of determining its terms we must look to the nature of the enjoyment by which it was acquired, for, as provided by the section already quoted, the nature of that enjoyment measures the extent of the servitude. It is quite apparent that the nature of defendant's enjoyment in this case was the right of conducting water in an open ditch over and across plaintiff's land; that right was acquired by actually conducting the water in an open ditch over plaintiff's land, and the servitude resting upon their realty is exactly of the same character, and no more or less burdensome than though plaintiffs had expressly granted to defendant the right to conduct water in an open ditch across their land. In *Ware v. Walker*, 70 Cal. 595, the court said: "The plaintiff, by the construction of his ditch and the appropriation and user of the water of the stream, acquired as against the defendant, * * * as complete and perfect a right to maintain his ditch and have the water flow to, in, and through the same as though such right or easement had vested in him by grant."

a. *List of the principal easements.* The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture.
2. The right of fishing.
3. The right of taking game.
4. The right of way.
5. The right of taking water, wood, minerals, and other things.
6. The right of transacting business upon land.
7. The right of conducting lawful sports upon land.
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land.
9. The right of receiving water from or discharging the same upon land.
10. The right of flooding land.
11. The right of having water flow without diminution or disturbance of any kind.
12. The right of using a wall as a party wall.

13. The right of receiving more than natural support from adjacent land or things affixed thereto.

14. The right of having the whole of a division fence maintained by a coterminous owner.

15. The right of having public conveyances stopped, or of stopping the same on land.

16. The right of a seat in church.

17. The right of burial.¹²

The following land burdens or servitudes upon land, may be granted and held, though not attached to land :

1. The right to pasture, and of fishing and taking game.

2. The right of a seat in church.

3. The right of burial.

4. The right of taking rents and tolls.

5. The right of way.

6. The right of taking water, wood, minerals, or other things.¹³

§ 183. **Easements that run with the land.** When the owner of land enters into an agreement, upon a sufficient consideration, subjecting it to an easement, or servitude, or profit *à prendre*, and the land is afterwards sold and conveyed to one who has actual or constructive notice of the agreement, the purchaser and grantee will take the land bound by the agreement, and will be restrained from violating it, whether the agreement is, or is not, one which in law runs with the land.¹⁴

But it is not the consideration in which the agreement had, as between the parties to it, its support, that makes the agreement affect and subordinate the land when afterwards sold and conveyed to some third person for value; but it is the actual or constructive notice which such third person has of the agreement when becoming the purchaser and grantee of the land, which essentially achieves that result.¹⁵

¹² 56 Cal. 13; 58 Id. 159, 192.

¹³ Cal. Civ. Code, secs. 801-2.

¹⁴ Tulk v. Moxhay, 2 Phil. 774; Parker v. Nightingale, 6 Allen (Mass.), 341, 83 Am. Dec. 632; Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715.

¹⁵ Paul v. Connersville & N. J. R. Co. 51 Ind. 527; Davies v. Sear, L. R. 7 Eq. 427; Morland v. Cook, L. R. 6 Eq. 252; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463.

In *Bronson v. Coffin*, 108 Mass. 175, 180, it was said, the court, speaking by Gray, J.: "An interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon that land, for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run with the land charged. And an obligation, duly expressed, that the structures upon one parcel of land shall forever be of a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other." And it was held by the court, where there was a covenant to make and maintain a fence on a railroad, contained in a deed granting to the road a strip for the right of way, that this covenant was an incumbrance on all the remaining land of the grantor, and ran with that land, because the covenant gave the grantee an interest in the nature of an easement in the adjoining land of the grantor.¹⁶

In *Parker v. Nightingale*, 6 Allen (Mass.), 341, the court say: "A covenant, though in gross at law, may be in equity binding even to the extent of fastening a servitude on real property. A purchaser of land, with notice of a right of easement in it, existing in favor of some other estate, by virtue of an agreement with his vendor, is bound to perform his vendor's agreements, or rather not to violate them, because it would be unconscientious and inequitable for him to disregard the valid agreements of his vendor. There may be neither privity of estate nor privity of contract between the aggrieved party, and those who attempt to appropriate the property in contravention of the mode of enjoyment impressed upon it by their grantor. The effect of the restriction is to confer on each owner an easement in all the lots which are con-

¹⁶ See also *Western v. Macdermott*, L. R. 2 Ch. 72; *Whitney v. Union R. Co.* 11 Gray (Mass.), 359, 364; *Parker v. Nightingale*, 6 Allen (Mass.) 341; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 314 (32: 673, 676); *McMurray v. Moran*, 134 U. S. 150 (33: 814).

connected with each other by a common interest in the restriction, and which were conveyed subject to it." But it must appear, either by express stipulation or necessary implication, that the parties intended to impose a permanent restraint on the mode of occupation of the respective estates.¹⁷ Such a right has been held to arise from a parol agreement, which is an exception to the rule, that easements can only be created by deed; but this is rather a case of estoppel or executed license.¹⁸ In one case the space next the street was laid down on a plan as open ground, and the owner, when selling, declared that it was always to remain open, but he put no restrictions in the deeds and bounded the lots sold on the street. A purchaser, who was building on this land, was enjoined at the suit of another purchaser who had built according to the plan. The court held that the representations and circumstances under which the sales were made, bound the original vendor and all who purchased under him, with notice to have the terms kept and fulfilled.¹⁹ And constructive notice from the record is enough.²⁰

In the case of *Whaley v. Stevens*, 21 S. C. 221, it was held that a right of way appurtenant is a right which inheres in the land to which it is appurtenant, is necessary to its enjoyment, and passes with the land, while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it; and the same doctrine was reaffirmed in the same case (27 S. C. 549), when it was again before this court, the chief justice, in delivering the opinion quoting the following language from Washburn on Easements (chap. 2, par. 5, p. 257): "Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere to the land, concern the premises, and be essentially necessary to their enjoyment."

¹⁷ *Brewer v. Marshall*, 3 C. E. Green (N. J.), 537; *Winfield v. Henning*, 6 Id. 190; *Hubbell v. Warren*, 8 Allen (Mass.), 173; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72.

¹⁸ *Hubbell v. Warren*, *supra*; *Tall-*

madge v. East River Bank, 26 N. Y. (12 Smith), 105.

¹⁹ *Maxwell v. East River Bank*, 3 Bosw. (N. Y.), 124.

²⁰ *Peck v. Conway*, 119 Mass. 546.

§ 184. **Of rights appurtenant and in gross.** A "way appurtenant" is incident to the estate, inheres in it, and goes with it on a transfer as essential to its enjoyment. "A right of way in gross" is personal to the grantee, and not assignable or inheritable.²¹

An easement in gross is a mere personal interest in the real estate of another, and is not assignable or inheritable.²²

Chancellor Kent, in speaking of such an easement, says: "It dies with the person, and it is so exclusively personal that the owner of the right cannot take another person in company with him."²³ Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it.²⁴ If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross; the rule for the construction of such grants being more favorable to the former than to the latter class. Says Washb. Easem. 45: "Though an easement, like a right of way, may be created by grant in gross, as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate; and, if it is gross, it cannot extend beyond the life of the grantee. Nor can it be granted over, being attached to the person of the grantee alone." The same author, on page 8: "A man may have a way in gross over another's land, but it must from its nature be a personal right, not assignable nor inheritable; nor can it be made so by any terms in the grant, any more than a collateral and dependent covenant can be made to run with the land."²⁵

²¹ Hall v. Armstrong, 53 Conn. 556 (1885), cases, Loomis, J.; Anderson's Law Dict.

²² Washb. Easem. (4th ed.), 12.

²³ 3 Kent's Com. 420; see also Ackroyd v. Smith, 10 C. B. 164; Garrison v. Rudd, 19 Ill. 558; Post v. Pearsall, 22 Wend. 425, 432;

Woolrych, Ways, 20; 2 Bl. Com. 35; Boatman v. Lasley, 23 Ohio St. 614.

²⁴ Kramer v. Knauff, 12 Ill. App. 115, 118; White v. Crawford, 10 Mass. 183.

²⁵ See also Boatman v. Lasley, *supra*.

Any right in the realty of another may be, if the law permits, a right appurtenant, otherwise it must be a right in gross, and, if the latter, may be a personal right or a right in fee. What it is depends on the intentions of the grantor and grantee and on the language of the constituting instrument. The traditional language of the books²⁶ to the contrary, is not supported by the decisions.²⁷

The right to enter on another's land and draw from it running water is recognized as an easement proper and not a "profit à prendre," for water is not a part or produce of the soil nor is it the property of the owner of the land over which it flows, and becomes such property only when confined in tanks.²⁸

And yet a right to draw or take water may be given to one and his heirs in gross.²⁹ It thus appears that Washburn's statement³⁰ is quite erroneous. Goddard³¹ says: "There is no such right known to the law as an easement in gross."³²

An easement cannot be severed from the land to which it is annexed and made a right in gross.³³

The cases of *White v. Crawford*, 10 Mass. 183, and *Senhouse v. Christian*, 1 T. R. 560, seem to be in conflict with this general statement concerning an easement in gross. In the former case the court says: "As to ways in gross, that they may be granted or may accrue in various forms to one and his heirs and assigns, there can be no doubt. There is a strong example of such grant in the case of *Senhouse v. Christian*, upon which the defendants justified as heirs of the original grantee."³⁴

²⁶ 3 Kent's Com. 420.

²⁷ *Senhouse v. Christian*, 1 T. R. 560; *White v. Crawford*, 10 Mass. 183; see also *Bowen v. Connor*, 6 Cush. 132, 137; *Holms v. Seller*, 3 Lev. 305; *Welcome v. Upton*, 6 Mees & W. 536.

²⁸ *Race v. Ward*, 4 El. & Bl. 702; *Manning v. Wasdale*, 5 Ad. & El. 758.

²⁹ *DeWitt v. Harvey*, 4 Gray (Mass.), 486; *Goodrich v. Burbank*, 12 Allen (Mass.), 456; *Lonsdale Co. v. Moies*, 21 Law Rep. 658.

³⁰ Easements, 10.

³¹ Easements, 6; Bennett's ed. 8.

³² Per Cairnes, L. J., in *Rangeley v. Midland R. Co.* L. R. 3 Ch. App. 306, 310, 311.

³³ Goddard, Easem. 8; Bennett's ed. 10; *Ackroyd v. Smith*, 10 C. B. 164; *Spensley v. Valentine*, 34 Wis. 154; Angell, Highways, sec. 1, and cases cited.

³⁴ See also *Lonsdale Co. v. Moies*, 21 Law Rep. 658, 664.

Whether these cases can be reconciled with the general doctrine is doubtful, although Mr. Washburn seems to think they can.³⁶ We think the greater weight of the authorities supports the doctrine announced, that easements in gross, properly so called, are not assignable nor inheritable. If, however, a right to take soil, gravel, minerals, water from a spring, and the like, from another's land, may properly be denominated as "easement" then it is proper to say that an easement in gross—for such it might doubtless be constituted—might be both assignable and inheritable; for the rights enumerated are "so far of the character of an estate or interest in the land itself that, if granted to one in gross, it is treated as an estate, and may therefore be one for life or inheritance."³⁸

As stated in *Woolrych on Ways*, 13: "A way appendant cannot be turned into a way in gross, because it is inseparably united to the manor or land to which it is incident." And, as stated in *Washb. Easem.* 4th ed. 26: "Though a man may acquire an easement in gross, like a right of way over another's land, separate and distinct from the ownership of any other estate to which it is appendant, yet if his right to such way result from his ownership of a parcel of land to which it is appendant, he cannot, by grant, separate the easement from the principal estate to which it is appendant, so as to turn it into a way in gross in the hands of his grantee."³⁷ Furthermore, as stated in *Columbia College Trustees v. Lynch*, 70 N. Y. 440; 26 Am. Rep. 619: "A negative easement, by which the owner of lands is restricted in their use, can only be created by covenant in favor of other lands not owned by the grantor and covenantor."³⁸

The law will not recognize any new species of easements, for "a new species of incorporeal hereditaments cannot be created at the will and pleasure of an individual owner of an

³⁵ Washb. Easem. 112; but see to the contrary *Goodrich v. Burbank*, 12 Allen, 460.

³⁶ See *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

³⁷ See also *Garrison v. Rudd*, 19 Ill. 558, 564, and cases cited; 3

Greenl. Cruise, 83; *Ackroyd v. Smith*, 10 C. B. 164; *Hall v. Lawrence*, 2 R. I. 218, 242, 57 Am. Dec. 715.

³⁸ See also *Hills v. Miller*, 3 Paige, 254, 3 L. ed. 141, 24 Am. Dec. 218.

estate. He must be contented to take up the sort of estate and the right to dispose of it as he finds the law settled by decisions or controlled by Act of Parliament.”³⁹

But it must be remembered that although any burden of a new species which the owner thinks proper to impose on his land is not an easement which can be made appurtenant to land, yet such an obligation is perfectly valid as between the grantor and grantee of the right. And if the grantee is disturbed in his enjoyment by the grantor the law will afford him ample remedy by action on covenant for the injury.⁴⁰

A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.

If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?

If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only?

Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant cannot be converted into a way in gross, nor can a way in gross be turned into a way appendant.

A very marked distinction also exists between a way in gross and an easement of profit *à prendre*; such as the right

³⁹ Goddard, Easem. 16; Bennett's ed. 21; Hill v. Tupper, 2 Hurist & C. 121; Keppel v. Bailey, 2 Myl. & K. 535.

⁴⁰ Goddard, Easem. 18; Bennett's ed. 21.

to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself, as to be treated as an inheritable and assignable interest.⁴¹

Both upon principle and authority, we think there is no error in a charge substantially to this effect. Mr. Washburn in his work on Easements, page 8, par. II, states the law upon this subject as follows: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right not assignable nor inheritable; nor can it be made so by any terms in the grant, any more than a collateral or independent contract can be made to run with the land."⁴²

§ 185. **Natural easements and servitudes.** Land on a lower level owes a natural servitude to that on a higher level in respect of receiving without claim for compensation by the owner the water naturally flowing down to it.⁴³ Rights for the artificial flow of water through a water course can be acquired by prescription — by twenty years of adverse user.⁴⁴ The rights of agriculture as well as the public good require that the proprietors of the higher ground should have the right to drain his own land, and the owner of the lower land shall not have the power to prevent it, except to save himself from damage or material injury.⁴⁵ But this right to concentrate a flow of water has been denied.⁴⁶

§ 186. **Implied easements.** The necessity which will raise an implied easement varies with the nature of the property and of the easement.⁴⁷ It is a question of presumed intention. If the servitude is a burdensome one, only strict

⁴¹ Post v. Pearsall, 22 Wend. 432.

⁴² See also Ackroyd v. Smith, 10 C. B. 164; Garrison v. Rudd, 19 Ill. 558; Post v. Pearsall, 22 Wend. 432; Woolrych on Ways, 20; 2 Bl. Com. 35; 3 Kent's Com. 420, 512.

⁴³ Lord v. Carton Iron Co. 42 N. J. Eq. 157; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126.

⁴⁴ Murchie v. Gaytes, 78 Me. 300.

⁴⁵ McCormic v. Horan, 81 N. Y. 86; Peck v. Goodberlett, 109 Id. 180; Anderson v. Henderson, 124 Ill. 164.

⁴⁶ Livingston v. McDonald, 21 Ia. 160; Dickinson v. Worcester, 7 Allen (Mass.), 19.

⁴⁷ Covell v. Hart, 56 Me. 520.

necessity will raise the implication. Great convenience alone will not give a way of necessity,⁴⁸ and the way will cease when the necessity ceases.⁴⁹ So, if the purposes for which the land is granted are inconsistent with the exercise of the easement, it will not exist.⁵⁰

What is called necessity is only a circumstance called in to explain the intention of the parties.⁵¹

§ 187. **Easements regarded as an incumbrance.** Rights of every description in the nature of an easement must, as matter of law, be regarded as an incumbrance. The same is true of a mortgage, whether recorded or not, and a claim to dower is equally objectionable, in that it has a tendency to impair the husband's title and all claiming under him by taking a freehold in one-third of it.⁵² By parity of reasoning a private way over the land of another is an incumbrance.⁵³ So of the right to go upon the land to clear a water course⁵⁴ or to cut standing timber.⁵⁵

These views are further vindicated by the case of *Kellog v. Ingersoll*, 2 Mass. 97, in which Ch. J. Parsons employs the following language: "The courts are well satisfied that the road, as here described, is an incumbrance on the land sold. It is a legal obstruction to the purchaser to exercise the dominion over the land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser or the damage may be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury, who may assess them, but it cannot affect the question whether a public town road is an incumbrance of the land over which it is laid."

⁴⁸ *Dodd v. Burchell*, 1 Hurist., etc., 121; *Brigham v. Smith*, 4 Gray, 297; *Smith v. Kinard*, 2 Hill. L. 642.

⁴⁹ *Lide v. Hadley*, 36 Ala. 627; *Viall v. Carpenter*, 14 Gray (Mass.), 126.

⁵⁰ *Seeley v. Bishop*, 19 Conn. 128.

⁵¹ *Nichols v. Luce*, 24 Pick. (Mass.), 102; *Collins v. Prentice*, 15 Conn. 39; *American Co. v. Bradford*, 27

Cal. 306; 2 Wait's Act. & Def. 668.

⁵² *Prescott v. Trueman*, 4 Mass. 627.

⁵³ *Mitchel v. Warner*, 5 Con. 497; *Harlow v. Thomas*, 15 Pick. (Mass.), 68.

⁵⁴ *Prescott v. Williams*, 5 Met. (Mass.), 433.

⁵⁵ *Cathcart v. Bowman*, 5 Barfr. 319.

§ 188. **Easements granted by mortgagor before foreclosure.** A very subtle distinction is ably presented by Mr. Thomas in his well known work on "Mortgages." It relates to rights in the nature of easements acquired from the mortgagor before the foreclosure of the mortgage. I quote the section in full.

"It is obvious that the purchaser cannot gain any advantage from contracts made by the mortgagor subsequent to the mortgage with any of the defendants in the action to foreclose, for such contracts were made with relation to an equity which the sale had destroyed, but it has been questioned as to whether he may claim the benefits of bargains made with persons who, by not having been made parties to the suit, are allowed to retain any advantage which they acquired under such bargains. In *Packer v. The Rochester & Syracuse R. R. Co.*, 17 N. Y. (3 Smith 283), an easement to construct a mill race across the mortgaged land had been granted by the owners of the equity of redemption to certain mill owners for which they undertook to construct the walls of said race in a specified manner. The mortgage was afterward foreclosed without making the mill owners parties, and the question arose in an action for damages for obstructing the race, brought by the mill owners against the purchasers at the foreclosure, as to the admissability of the original contract under which the race had been built, and of a decree in chancery between the parties to such contract decreeing its specific performance. The opinions of Denio and Pratt, JJ., are interesting as showing the diverse views held by those learned judges with regard to the rights of the purchaser under the foreclosure sale, though they arrived at the same conclusion with regard to the case then under consideration. Denio, J. held that by the foreclosure the equity of redemption was extinguished; that the purchaser did not claim under the mortgagors by title subsequent to the contract offered in evidence, but by paramount title, and that he could, therefore, neither be bound by it nor could he avail himself of its advantages. Pratt, J., on the other hand, maintained with great force the proposition that the purchaser's title, so far as an incumbrancer who was not made a party to the action was concerned, was that of a grantee from

the mortgagor as of the date of the foreclosure, and that not only could such incumbrancer insist upon the benefits which contracts subsequent to the mortgage had assured to him, but also that the purchaser could enforce the reciprocal obligations which had induced the mortgagor to grant such benefits.⁵⁶

In *Rector, etc., of Christ P. E. Church v. Mack*, 93 N. Y. 488, reversing 25 Hun, 418, the defendant's husband had purchased the property from the mortgagor subject to the mortgage and to a servitude subsequently created restricting the use of the property so as to allow the adjoining property to have the use of windows opening upon it. The title was thereafter granted to the defendant. The mortgage was subsequently foreclosed, and the defendant having become the owner thereunder, she commenced the erection of buildings which would have closed the windows of the adjacent property. The action was brought to restrain the continuance of such erection, and an injunction was granted and sustained by the General Term. It was conceded that a purchase under the foreclosure would have given a stranger to the title an ownership discharged of plaintiff's easement, and the Court of Appeals decided that the same result attended the purchase by the defendant, notwithstanding her relation to the property. The rule was declared to be that "the effect of the foreclosure deed, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent incumbrances and conveyances of the mortgagor."⁵⁷

§ 189. **Easements granted by way of reservation.** It is fully stated in *Claflin v. B. & A. R. R. Co.*, 157 Mass. 489, as a summary of the authorities that if an easement is created by way of reservation, the word "heirs" is necessary to create an easement in fee; that in Massachusetts, however, an easement may be created by way of exception or reservation, and if created by way of exception the word "heirs" is not necessary to create an easement in fee if the grantor owned the fee at the time of the conveyance, and also that "as an exception

⁵⁶ Thomas on Mortgages, 668.

⁵⁷ Thomas on Mortgages, 669, sec. 1025.

may be created by words of reservation, little reliance can be placed upon the words used in determining whether the right is by way of exception or by way of reservation."

§ 190. **Evidence of right.** As easements are created by grant, the production of that grant is the proper evidence of their existence, and its language is the evidence of their nature and limitations.⁵⁸ But if the writing is produced it may contain no direct mention of the easement. In such case it may still be established by a construction of the words of the instrument. No particular words are necessary for such a grant; any words which clearly show the intention to give an easement which is by law grantable, are sufficient.⁵⁹ The questions, without regard to the form of words, would be: First, Does an intention appear to confer a right to affect the land of the grantor. Second, Is the right one which is capable of being made the subject of a grant as an easement. If these two questions are answered in the affirmative, an easement has been created.⁶⁰

§ 191. **By grant or deed.** Easements are created by grant.⁶¹ Under the Statute of Frauds, no interest in lands can be conveyed except by deed, and at common law incorporeal rights which lay in grant and not in livery could only be transferred by deed.⁶²

The early English law which found subtle distinctions between what is termed "implied grants and implied reservations," should be repudiated in a country like ours where realty is constantly appreciating, especially in the vicinity of cities, and where many forms of local improvement induce frequent changes both in the market value and in the ownership. These implications, especially as affecting easements of light and air, should be carefully scrutinized and when founded upon sheer necessity and convenience, like the kindred doctrine of "ancient windows," or prescriptive right to

⁵⁸ *Garland v. Furber*, 47 N. H. 304; *Lyman v. Arnold*, 5 Mason's C. C. 195; *Maxwell v. McAtee*, 9 B. Mour. (Ky.), 20.

⁵⁹ *Rowbotham v. Wilson*, 8 H. L. Cas. 362.

⁶⁰ *Gale on Easem.* 87.

⁶¹ *Duinneen v. Rich*, 22 Wis. 550; *Cook v. Pridgen*, 45 Ga. 331; *Adams v. Andrews*, 15 Q. B. 284.

⁶² 2 Washb. Real Prop. sec. 552; *Beaudely v. Brook*, Cro. Jac. 189.

light and air by long user, is wholly unsuited to our condition, and is not in harmony with the general understanding of the public. In cases of cheap and temporary buildings the application of the doctrine would be attended with great uncertainty and be a fruitful source of litigation. It would, moreover, in many cases operate as a veto to all improvements in our towns and cities because such easements are a perpetual incumbrance upon the servient estate. It will be safer and better conserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts. There is considerable diversity in the reported cases but *Collier v. Pierse*, 7 Grey (Mass.), 18; *Myers v. Gimmel*, 10 Barb. 537; *Maynard v. Esher*, 17 Pa. St. 222; and *Haverstick v. Sipe*, 33 Id. 368, sustain the above contention. In the case last cited it was held that the grant of an easement for light and air is not implied, from the fact that such a privilege has been long enjoyed, and that a contract for such a privilege is not implied, on the sale of a house and lot, from the character of improvements on the lot sold and the adjoining lots. The court say: "There is a sort of necessity for such an implication relative to other apparent easements, such as roads and alleys, in order to account for a use of another man's land, that would otherwise be a wrongful encroachment; and the implication is easily framed or defined, for it appears on the ground. But how can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enjoyment of a man's house, according to the demands of a growing or improving family? A purchaser of a house in a crowded town never supposes that his neighbor will have a right to prevent him from changing the form of it according to his taste."

The doctrine of implied grants of easements or privileges connected with real estate, is accorded but very scant respect by the American courts. The courts seldom go beyond holding, with substantial unanimity, that there is an implied grant of whatever is essential to the beneficial enjoyment of the thing granted. This is the familiar and the safer rule.⁶³

⁶³ *Buss v. Dyer*, 125 Mass. 287; *lor*, Land. & Ten. sec. 161; 2 Wash. Doyle v. Lord, 64 N. Y. 432; *Tay* Real Prop. 29.

§ 192. **By prescription.** The law governing the acquisition of easements by long continued user or prescription stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbor of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence.

An uninterrupted possession and use of an incorporeal hereditament or easement, such as a way or a water privilege, for twenty years, is *prima facie*, and, if unexplained, conclusive evidence of a right; under some circumstances the courts will entertain the presumption of a grant, even for a shorter period. A right thus acquired by "user" may, in like manner, be lost by "disuser;" in other words, discontinuance of the use for a long period affords a presumption of the extinguishment of the right.⁶⁴

An adverse use is such a use of property as the owner himself would make, asking no permission, and disregarding all other claims so far as they conflict with this use. Continued for twenty years, such use is equivalent to a grant.⁶⁵

The cases usually say that this right, acquired by twenty years' undisturbed and uninterrupted enjoyment of an easement, is founded on the presumption of a grant or release; and if so, it is not an absolute title, but one that is liable to be rebutted by circumstances, and is to stand good until the presumption of title be fully and fairly destroyed. This was the doctrine so late as the cases of *Campbell v. Wilson*, 3 East's Rep. 294, and of *Livett v. Wilson*, 3 Bing. Rep. 115,

⁶⁴ Hazard v. Robinson, 3 Mass. 275 (1823), Story, J.

⁶⁵ Blanchard v. Moulton, 63 Me. 436 (1873), Appleton, C. J.

and it is the prevalent language in the books, English and American. A plea for an easement enjoyed for twenty years under the statute of 2 and 3 William IV, must state that the enjoyment was had as of right.⁶⁶ But some of the later English authorities seem to give this presumption the most unshaken stability, and they say it is conclusive evidence of title. In *Tyler v. Wilkinson*, 4 Mason, 397, where the whole law on the subject is stated with learning, precision, and force, the presumption is even made to be one *juris et de jure*, and to go to the extinguishment of the right in various ways, as well as by grant.⁶⁷

On the other hand, the case of *Reimer v. Stuber*, 20 Pa. St. 458, where a right of way was claimed by prescription, and sought to be avoided on the ground of disability, the use began during the minority of the owner of the land, and who before she became of age was married, it was held that the time began to run when she became of age, notwithstanding the subsequent disability of coverture. If the case stood really upon the ground of a presumed grant, and it could not be presumed because the owner was under a disability, and could not make a grant, it must extend through both disabilities. The case can stand only upon the analogy of the statute. In that view it is clearly correct.

Mibane v. Patrick, 1 Jones, N. C. 23, was a claim by the plaintiff that he had acquired a right of way by use. After the use began the owner of the servient estate became insane. It was decided that as the disability did not exist at the time of the commencement of the plaintiff's adverse use, it did not prevent the use ripening into a right. The court say: "Such being the law as to the Statute of Limitations, it follows it must be so, in regard to prescriptions also." The language of Judge Story in *Tyler v. Wilkinson*, 4 Mason, 402, in this respect goes beyond what most courts are disposed to hold, indeed disabilities coming clearly within the saving of the statute, would not avoid a prescription, according to the most general interpretation of his language. But, doubtless, it was not intended by him to bear so broad a meaning.

⁶⁶ *Holford v. Hankinson*, 5 Adol. & Ellis (N. S.), 584.

⁶⁷ 3 Kent's Com. 595.

Prof. Washburn in his treatise on Easements says: 'Perhaps the difference in the provisions of the Statutes of Limitations in the different States, may account for the discrepancy in the decided cases.' But they can hardly be reconciled on such a basis. In both Massachusetts and New Hampshire, it is fully settled, that under their Statutes of Limitations no disability avoids their operation, unless it exists at the time the right first accrues. The decisions in those States must have been made in entire disregard of the analogy of the statute in this respect, and we think they were made by giving undue importance to the fictitious theory of a lost grant.

The cases opposed to them are in our judgment founded upon much sounder legal reason, and we are disposed to follow the Pennsylvania and North Carolina cases, rather than those nearer home.

The mere inattention of the owner of land to the fact that an easement in it is used by another, does not weaken the force of the presumption which the lapse of time creates. Such presumptions, like the Statutes of Limitation, will work out their purpose though the party affected by them should close his eyes. It would not do to say that the mere ignorance of the owner repelled the presumption of a grant.

Where a tenant for years or for life grants an easement such grant is of no force or validity against the reversioner or remainderman. So, if the tenant of a particular estate suffers an easement to be enjoyed for twenty-one years, it raises no presumption of a grant by him in remainder or reversion. But here the land was occupied by tenants from year to year. The owner of the fee was in possession and had the right to bring suit every year. The case is wholly different from that of one who is out of possession during the whole of the time.

No presumption of a grant arises from the adverse enjoyment of an easement against a minor or *feme covert*. The presumption operates in strict analogy to the Statute of Limitations, which recognizes the disabilities of infancy and coverture as sufficient excuses for inaction. But a second disability added to one which existed when the adverse enjoyment first began is always disregarded. Thus, a cover-

ture which took place during infancy is not taken into account after the infancy has ended.

The title to an easement of a burial lot may be acquired by prescription, where adverse possession for that purpose is held for the statutory period. Adverse possession of a burial lot is held by its use for a burial place, with or without enclosure, as long as gravestones stand marking the place as burial ground.⁶⁸

A several or exclusive right of fishing in the estate of another may also be gained by an adverse, uninterrupted, and exclusive use and enjoyment of it for the period required by the Statute of Limitations.⁶⁹ In such case the one so using it acquires title to the right of fishing against all the world.⁷⁰ and can maintain trespass against anyone, even the owner of the soil, for taking the fish.⁷¹

The user and enjoyment of the right claimed, in order to become an easement by prescription, must have been adverse to the owner of the estate from which the easement is claimed, under a claim of right, exclusive, continuous and uninterrupted.

In Massachusetts an easement of light and air over the land of an abutting owner cannot be acquired by prescription.⁷²

§ 193. **By dedication.** In *Tinges v. Baltimore*, 51 Md. 609, it is said: "It is well settled by the decisions of this court that an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential to a dedication, and, unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists."⁷³

⁶⁸ Hook v. Joyce, 94 Ky. 450.

⁶⁹ 2 Washb. Real Prop. (4th ed.) 366; *Tinicum Fish Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

⁷⁰ *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Church v. Meeker*, 34 Conn. 421; *Preble v. Brown*, 47 Me. 284; 3 Kent's Com. 43.

⁷¹ *Adams v. Pease*, 2 Conn. 481; *Smith v. Kemp*, 4 Mod. 187, 2 Salk.

637; *Holford v. Bailey*, 13 Q. B. 426; *Collins v. Benbury*, 5 Ired. L. 118, 42 Am. Dec. 155; *Delaware & M. R. Co. v. Stump*, 8 Gill. & J. 479; *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654.

⁷² *Richardson v. Pond*, 13 Grey, 387; *Randal v. Sanderson*, 111 Mass. 119.

⁷³ *McCormick v. Baltimore*, 45 Md. 524.

So in *Shellhouse v. State*, 110 Ind. 513; 9 West. Rep. 63, "To constitute a valid dedication, there must have been an actual intention on the part of the owner, clearly indicated by unequivocal acts or conduct, to dedicate the land to the public for use as an alley.""

"As was in effect said in the case above cited, unless there appears an actual intent to dedicate on the part of the owner, the court cannot do otherwise than to find that there was no dedication."

So in *Holdane v. Cold Spring*, 21 N. Y. 477: "The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication."

a. *The burden of proof.* In *Lownsdale v. Portland*, 1 Or. 405, Deady, J., in discussing this question says: "The burden of proof rests on the defendant to show a dedication. It must be clear and satisfactory. * * * The security and certainty of the title to real estate are among the most important objects of the laws of any civilized community. Around it the law has thrown certain solemnities and formalities so that the fact may be known and read by all men. What a man once had he is not to be presumed to have parted with, but the fact must be shown beyond conjecture; and although in the case of streets and public grounds in towns, from the nature of the case a dedication may be shown by acts resting in parol, they must be of such a public and deliberate character as makes them generally known and not of doubtful intention."

In *Baugan v. Mann*, 59 Ill. 492, which was an injunction to prevent one who held title under Sprague, who, it was alleged, had dedicated an alley in the rear of appellee's premises, it was said: "The evidence fails to show title in Sprague. Unless he owned the fee he could make no dedication to public use. A primary condition of every valid dedication is that it must be made by the owner of the fee."

⁷⁴ *Tucker v. Conrad*, 103 Ind. 349; 1 West. Rep. 281, and cases cited.

In *Porter v. Stone*, 51 Iowa, 373, the court said: "The party who lays out a town site, the effect of which is to donate to the public streets, alleys and public grounds, must of necessity have some title to the property to be affected by his act. A grant to the public is not established by simply showing that a town site has been laid out. The party claiming benefits of a grant must go further, and show the title of the party laying out the town, and thus undertaking to make the grant."

In *Leland v. Portland*, 2 Or. 47, where the question was whether a dedication of land in front of the city of Portland between the Willamette river and the westerly side of the street, which was made before September 27, 1850, was of any validity, the court said: "The next question presented is, did the court below err in refusing to instruct the jury that a dedication of the property in question, to be binding, and to divert the title from the donor to the public, must have been since the 27th day of September, 1850? I regard this question as settled by the case of *Lownsdale v. Parish*, 62 U. S. (21 How.) 290; 15 L. ed. 80, which case arose on the question of the dedication of the levee in the same city of Portland, and by these same proprietors of a town site, and was governed by the same considerations in this respect as govern this case, where it was held that a dedication made prior to act of September 27, 1850, was void for want of any title then being in the United States." In England the rule has been the same, the leading case being *Wood v. Veal*, 5 Barn. & Ald. 454, where it was held that a tenant for ninety-nine years could make no dedication to the public, nor could any one else excepting the owner in fee.

b. *Acceptance*. It is settled law in England that no formal acceptance of a highway by dedication is necessary to constitute it a public street, and while this rule has not been formally accepted in all jurisdictions, yet it is entirely safe to assume that the weight of authority in this country sanctions the English rule.⁷⁵

⁷⁵ *Norse v. Ranno*, 32 Vt. 600; *v. Nudd*, 3 Fost. 327; *Leech v. Hays v. The State*, 8 Ind. 425; *Waugh*, 24 Ill. 228; *Connehan v. Smith v. The State*, 3 Zbr. 130; *Ford*, 9 Wis. 240; *Morley v. Taylor*, *Curtis v. Hoyt*, 19 Conn. 154; *State* 19 Ill. 634.

Work done by proper authority in the way of grading and ballasting a road will warrant the presumption of acceptance on the part of the public officials.¹⁶ So the convenience to the public of the highway in question may be shown, when dedication is proved with reasonable certainty, and there has been a long continued user by the public as a means of basing the presumption of acceptance. In Iowa user by the public for a period of ten years has been held sufficient evidence upon which to base a presumption of dedication and acceptance.¹⁷ And generally it may be said that the various rules sanctioned by the authorities above cited are in accord with reason, and indeed are necessary corollaries from other undisputed doctrines.

The owner of land may dedicate or set apart a street or highway through it to the public use, and if the dedication is accepted, it will work an estoppel *in pais* precluding the owner from asserting any inconsistency with such use. The dedication and acceptance are to be proved or disproved by the acts of the owner and the circumstances under which the land has been used. Both are questions of intention. The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication. In the case of a highway, the public must accept the dedication, and before it is accepted, the owner is not precluded from revoking it. It is not necessary that there should be any formal act of acceptance by the public authorities, but it may be indicated by common user, under circumstances clearly showing an intent to accept and enjoy, as such, the easement proposed to be dedicated. Throwing open land in a village, and fencing it on each side, and causing the way or avenue to be designated as public on a map of the village, are acts tending strongly to show a design

¹⁶ Folsom v. Underhill, 32 Vt. 580; People v. Jones, 6 Mich. 176; Comm v. Belding, 13 Met. (Mass.), 10; Alvord v. Ashley, 17 Ill. 363.

¹⁷ Keyes & Crawford v. Tait, *supra*; Onstott v. Murray, 22 Ia. 457.

presently or at some future period to dedicate and devote it to the public use. But these acts are not conclusive to establish a present dedication, binding on the owner of the land. One may fence off a strip of his own land for the purpose of a passageway, opening on a public street, or he may lay out a street through it with a view of subdividing his land bounded upon it into village lots, intending upon the sale of such lots to dedicate the street to the use of the public; but in such cases, though the public may have occasionally, or indeed at all times, used the open way in passing to and from the enclosure of an adjoining proprietor, it could scarcely be pretended that the land had thereby become burdened with an irrevocable public servitude.⁷⁸ The law of dedication is somewhat anomalous, but it may be said to rest, in part at least, upon the doctrine of estoppel *in pais*. Though the owner of land may evince by his acts an intention to dedicate a street or square, or other plat of ground, to the public use, no sufficient or valid reason can be assigned against a change of purpose and a subsequent resumption of the possession, unless the public accommodation and private rights are to be materially affected by an interruption of the enjoyment. If, however, private rights have been acquired with reference to such dedication, and such an interest decurrd, with the assent and concurrence of the owner, as would make it fraudulent in him to resume his rights, the dedication becomes irrevocable.⁷⁹

c. *Set form of words unnecessary.* No particular form of words is necessary to constitute a dedication for the purposes of a highway. The intention of the owner to set apart the lands for the use of the public as a highway, the *animus dedicandi* is the foundation principle, the very life of dedication. When this is unequivocally indicated by the assertions and acts of the owner, the dedication is complete. So it has been held that a long user of a passage as a public way, street or alley will raise a presumption of dedication, and there are other methods of inferring such an intent — as where the former owner of the highway has sold building lots abutting upon lands used as a way — referring would-be purchasers of

⁷⁸ Holdane v. Cold Spring, 21 N. Y. 474.

⁷⁹ Haynes v. Thomas, 7 Ind. 38; Price v. Thompson, 48 Mo. 361.

such building lots to a map whereon the location of the way was traced to represent a street, by statements made to either actual or prospective purchasers, and doubtless in other ways that would evidence an intent to give an easement to the public.⁸⁰

d. *Effect of platting.* When the owner of property which is within the limits of an incorporated city or town makes and records a map of such property, by which he subdivides the same into blocks and lots bounded by streets which are continuations of other streets already laid out by the city or town, and sells and conveys the lots abutting upon those streets, he thereby dedicates to the public the streets so laid out by him as prolongations of other streets, as well as the other streets which are laid out on such map intersecting and connecting the same; and if upon such map or plan, he has designated a space or block as a public park, such space or block is as fully dedicated to public use as are the streets delineated thereon. The purchasers of such lots have not merely an easement in the streets upon which the lots abut, but all of the streets are set apart for the purpose of enabling such purchasers to have reciprocal intercourse with the public outside of the subdivided tract, and are thus themselves dedicated to the entire public for all purposes to which streets can properly be applied. The same principles which are applicable to the dedication of public streets apply to the dedication of a public park or square. All dedications for public use are to be considered with reference to the purpose of which the dedication is made, or the use to which the property dedicated may be applied and that purpose may be ascertained by the dedication the owner has affixed to the land upon the map, whether it be a street, a school lot, or a public park. The setting apart of a public park upon such map is for the convenience and enjoyment of the inhabitants of the place, and, as it enhances the value of the private property fronting thereon, so the owner who has dedicated it is presumed to have received, in the increased prices for

⁸⁰ Keyes & Crawford v. Tait, 19 Ia. 123; Marcy v. Taylor, 19 Ill. 634; Lade v. Shepard, 2 Strange, 1004; State v. Atherton, 16 N. H. 293; Harding v. Jasper, 14 Cal. 642; Lowndale v. Portland, 1 Ore. 397; Gwynn v. Homan, 15 Ind. 201; Angel on Highw. sec. 143.

which that property was sold, the compensation for its surrender to the public as a public park. The word "park" written upon a block of land designated upon a map, is as significant of dedication, and of the use to which the land is dedicated, as is the word "street" written upon such map. The word carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers.

It is the first principle of platting, that the one who plats must be the owner in fee of the land platted. Says Angell on Highways, sec. 132: "Dedication is an appropriation of land to some public use, made by the owner of the fee;" and in sec. 134: "A primary condition of every valid dedication is that it shall be made by the owner of the fee." Herman on Estoppel, sec. 1143, says: "A primary condition of every valid dedication is that it shall be made by the owner of the fee, or of an estate therein." In *Lee v. Lake*, 14 Mich. 12, Judge Cooley said: "The plat put in evidence was made by Brooks and Crane at a time when they do not appear to have had any interest in the land, and if the execution (of the plat) had been in all respects in due form it could not have had the effect which the statute gives to plats executed and acknowledged under its provisions. The statute then in force provided for the making, acknowledging and recording of town plats by the proprietors, and it is impossible to give the peculiar statutory effect of a present conveyance to a plat made by persons who at that time had no title to convey, even though they may have afterwards become the owners. And as the Healing Act of 1850 was confined in its scope to imperfect acknowledgments, it could not give effect to a plat which no acknowledgment could have made effectual at the time it was made." This decision was concurred in by Judges Christiancy and Campbell.

The case of *Hoole v. Atty.-Gen.*, 22 Ala. 190, is considered a leading case upon this subject, and therein the court held not only that it must be the owner of the fee who could make a lawful dedication which the State even could take advantage of, but that if the land, at the time of the attempted

dedication, was covered by a mortgage, the mortgagor could not dedicate without the acquiescence of the mortgagee.

Dedication is an ultimate fact dependent upon the establishment of other facts, and it is to be found from the evidence presented to the court.⁸¹ It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be expressed and completed by a single act, as when the land is dedicated by deed; or it may be implied from a series of acts, as when an owner subdivides a tract of land into blocks and streets and causes a map of such subdivisions to be recorded and sells the several divisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it, or right to its use. Even though the acceptance presumed from an expressed dedication may not impose upon the public all the obligations that an express acceptance would impose, yet the owner is as much concluded by his dedication in the one case as in the other. If the dedication is complete by his act whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use nor can it be lost by adverse possession. Nor is the effect of such a dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated, whenever convenience or necessity may suggest.

e. *A distinction noted.* A distinction is to be observed between actual dedication and an offer to dedicate. In the latter case there must be an acceptance on behalf of the public before the dedication is complete, and the owner may at any time before such acceptance revoke the offer, while in the former case the acceptance will be presumed from the benefit arising from the dedication. The acceptance of an offer to dedicate may, moreover, be formal, as by resolution

⁸¹ *Harding v. Jasper*, 14 Cal. 648.

on the part of the city, or it may be implied, as by user or adaptation for use, as in the improvement of the streets. Merely recording a map of the subdivided tract, or simply designating the streets and blocks by stakes or monuments upon the ground, would constitute no more than an offer to dedicate. Whether the owner, by making sales according to such map or designation, has made the offer with reference to other streets than those by which the lots sold are bounded, is a fact that the court must determine from the circumstances of each case, such as the number of sales, their proximity to the street claimed to have been dedicated, the use to which the land has been put, and the means by which, or the extent to which, the streets have been brought into connection with other streets or highways. The owner, after selling some of the lots according to such map, might either with the consent of the purchasers, or if he himself should re-purchase all of the lots so sold, withdraw such offer at any time before the public had acquired any interest 'in the streets, either from formal acceptance or by actual user.⁸² In *San Leandro v. Le Breton*, 72 Cal. 170, it was held that the sale of the blocks opposite the space designated on the map as "Court Square," with other lots and blocks upon the map, effected such a dedication of that space that it could not afterwards be revoked by the owner.

In *Irwin v. Dixon*, 50 U. S. (9 How. 10); 13 L. ed. 25, the court say: "From the very nature of wharf property, likewise the access must be kept open for convenience of the owner and his customers; but no one ever supposed that the property thereby became public, instead of private. * * * No length of time during which property is so used can deprive an owner of his title. * * * While anyone might be allowed to travel over this space from the warehouse to the wharf and river when convenient and not interfering with the owner, it was not because it has been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing and so leaving it open, would not be captious in preventing others from travelling there."

⁸² *Rowan v. Portland*, 8 B. Mon. 236.

The same principle is laid down in the note to *Dovaston v. Payne*, 2 Smith, Lead, Cas. Hare & W.'s note, p. 155, wherein it is said: "If, therefore, a person opens and uses space upon his own land as a road for his own convenience and purposes, the mere fact that the community are allowed to make use of it in common with him for even twenty or thirty years, will not constitute a dedication of it to the public use, especially in the face of declarations on his part inconsistent with an assent to such dedication."

f. *Common law dedications.* By the rules applicable to what are known as "common law dedications," lands or easements therein may be dedicated to the public, so as to become effectually vested, without the aid of any conveyance. It may be done in writing, by parol, by acts in pais, or even by acquiescence in the use of the easement by the public. All that is necessary is that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done the right or easement becomes instantly vested in the public. But a dedication of this character, to be effectual, must be to the public.⁸³ At the common law they are confined to the purpose of highways, but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying grounds, school lots, and lots for school purposes, and pious and charitable uses generally, and in many cases where the use was either expressly, or from the necessity of the case limited to a small portion of the public.⁸⁴ No decision can be found, where a dedication of this character, made for any other purpose than one strictly public, has been sustained. Railroad companies, though engaged in the public employment of common carriers, are essentially private corporations; and, while the lands comprising their rights of way are acquired for a public purpose, the ownership of such lands, when acquired, is private. In no proper sense can such corporations be regarded as constituting the public or a portion of the public to which common law dedications of land can be made. Donations or gifts of land can undoubtedly be made to them where the donor sees

⁸³ Washb. Easem. 205.

⁸⁴ 5 Am. & Eng. Encyc. Law, 416, and authorities cited in notes.

fit to effectuate his gift by some one of the ordinary modes of conveyance, and the donation can also be made by plat, where the donor sees fit to mark or note on his plat that the land which he wishes to give to such corporation is donated or granted to it. There is no authority in the law for holding that a railroad corporation may acquire title to or an easement in land by common law dedication.

§ 194. **Rule of strict necessity examined.** It was said in the opinion in *Buss v. Dyer*, 125 Mass. 287, that if an easement existed by implication it was because it was absolutely necessary to the enjoyment of the estate granted. In New York the rule of strict necessity is applied to implied reservations, but not to implied grants. In the recent case of *Wells v. Garbutt*, 132 N. Y. 430, it was said: "As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed, most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor." This distinction between implied reservations and implied grants, there pointed out, is well founded in the law, although in some of the reported cases it has apparently been overlooked.

In *Johnson v. Jordan*, 2 Met. (Mass.) 234; 37 Am. Dec. 85, Chief Justice Shaw, after stating the rules applicable to the construction of a grant, said: "If a man owning two tenements has built a house on one and annexed thereto a drain through the other, if he sell and convey the house, with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it, because such a construction would be most beneficial to the grantee; whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that, as the right of drainage was not reserved in terms, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor, and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance."⁸⁵

⁸⁵ See also *Wheeldon v. Burrows*, Easem. (4th ed.), 105, 106; *Burr v. L. R. 12 Ch. Div. 31*, 49; *Washb. Mills*, 21 Wend. 290.

In *Johnson v. Jordan*, *supra*, the conveyances of the dominant and servient tenements were simultaneous, and the right to the easement was denied upon a construction given to the deeds and the circumstances attending their delivery.

In *Buss v. Dyer*, 125 Mass. 287, the chimney in which an easement was claimed had worn out, and had been taken down, and the jury found as a fact that the plaintiff at a reasonable cost could have built one on his own property; and the facts of the case amply justify the decision without reference to the rule of strict necessity. Undoubtedly, an easement to pass by implication must be necessary to the enjoyment of the estate granted, but the necessity required is a reasonable, not an absolute, one. Mere convenience would not be sufficient to create or convey the right. The privilege or right implied must be of value to the estate granted, which the grantee has estimated as an advantage to the estate and paid for in his purchase.

In *Curtiss v. Ayrault*, 47 N. Y. 73, the essential question of fact there involved was stated to be whether the grantor of the plaintiff, in arriving at the price he would pay, considered, and had a right to consider, as an element of value of the land he was buying, the ditch across the tract giving the supply of water through it.⁸⁶ *Root v. Wadhams*, 107 N. Y. 384, a case frequently cited, was distinguished by the court in its facts from *Lampman v. Milks*, 21 N. Y. 505, and kindred cases. Nothing must be added to what was there said on this subject.

§ 195. Effect of dividing estates subject to. All the authorities concur in holding that the rule of law which creates an easement on the severance of two tenements or heritages, by the sale of one of them, is confined to cases where an apparent sign of servitude exists on the part of one of them in favor of the other; or as expressed in some of the authorities, where the marks of the burden are open and visible. Unless therefore the servitude be open and visible, or at least unless there be some apparent mark or sign which would indicate its existence to one reasonably familiar with the sub-

⁸⁶ See also *Simmons v. Cloonan*, 11 R. I. 259; *Washb. Easem.* (4th ed.), 110, 111.
81 N. Y. 557-566; *O'Rorke v. Smith*, ed.), 110, 111.

ject, on an inspection of the premises, the rule is without application.⁸⁷

Under the Civil Code of California, sec. 1104, "a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." It follows that if the owner of lands divides his property into two parts, and then conveys one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part conveyed, in the form which it assumes at the time he transferred it.⁸⁸

§ 196. **Easements and servitudes of way.** a. *The term right of way defined.* This phrase imports a right to pass over another's land more or less frequently according to the nature of the use to be made of the easement; and how frequently is immaterial provided it occurs as often as the claimant has occasion to pass. It must not have been interrupted by the owner of the land across which the right is exercised, nor voluntarily abandoned by the claimant. Mere intermission is not interruption and the continuity of the enjoyment may be shown by circumstantial evidence.⁸⁹ A right of way is an incorporeal hereditament of that class of easements in which a particular person, or description of persons have an interest, although some other person is the owner of the tenement or land.⁹⁰

The term when applied to railways is construed as referring to the easement which the railroad company has obtained in the lands of others through the statutory process of condemnation or by direct purchase.⁹¹ It will also include by necessary implication all lands acquired for side

⁸⁷ Butterworth v. Crawford, 46 N. Y. 349.

⁸⁸ Cave v. Crafts, 53 Cal. 135.

⁸⁹ Bodfish v. Bodfish, 105 Mass.

⁹⁰ Wild v. Deig, 43 Ind. 458.

⁹¹ Williams v. Western Union R. Co., 50 Wis. 76.

tracks and turnouts.⁹² And it has been held to refer to the mere intangible right, so frequently exercised by the general public of crossing the railroad tracks at certain localities.⁹³

A right of way may exist by prescription, grant, usage or necessity.⁹⁴ But it must be remembered that all prescriptive rights are *stricti juris*. A right of way for one purpose does not necessarily include a right of way for another purpose. The extent of the right must depend largely upon the circumstances surrounding each particular case.⁹⁵ So a right of way by necessity will terminate with the necessity.⁹⁶ Again, it is of prime importance to remember that a right of way appurtenant to land is regarded, as matter of law, as appurtenant to all and every part of the land, and that upon a division of land, to which a right of way is attached, a right of way will exist in the owner of each of the parts, into which it is divided.⁹⁷

A right of way established by grant is not lost by mere non user. Unless the non user is a consequence of something which prevents the user, and is utterly inconsistent with its enjoyment, it continues to exist, although more than twenty years have elapsed.⁹⁸

What is a reasonable use of a way, where the purposes are not defined in the grant, is a question of fact, to be determined upon evidence. A grant without restriction is understood to be general for all purposes.⁹⁹ If a passageway granted by deed has been used in a certain mode from the time of making the deed to the time of an alleged trespass, without any objection being made, this evidence is admissible to show what was intended by the grant.¹⁰⁰

The declarations of a deceased former owner of land, made during his ownership, and tending to prove the existence of

⁹² Pafaff v. Terre Haute R. R.Co., 107 Ind. 144.

⁹³ Keener v. Union Pacific R. R. Co., 31 Fed. Rep. 128.

⁹⁴ Derrickson v. Springer, 5 Harr. 21.

⁹⁵ Ballard v. Dyson, 1 Taunt. 279.

⁹⁶ 1 Barb. Ch. 354; Pierce v. Sellick, 18 Conn. 321.

⁹⁷ Watson v. Bioren, 1 Serg. & R. 229,

⁹⁸ Barnes v. Lloyd, 112 Mass. 224.

⁹⁹ Rowell v. Doggett, 143 Mass. 487 (1887); Washburn, Easem. 254, 282.

¹⁰⁰ Choate v. Burnham, 7 Pick. (Mass), 274.

a right of way over it, are competent evidence against the present owner.¹⁰¹ These are admitted upon the ground that they are against the owner's interests and in disparagement of his title.

The use of a way for more than twenty years over an academy common, with occasional trifling repairs of the way, does not, as matter of law, establish a right by prescription.¹⁰² And where, after such twenty years' user, the owner built a fence across the way, leaving a gate for the sole convenience of the pupils, and informed the person so using the way that the act was expressly to prevent such use by him, and no right of way was asserted in reply, it was held that the facts warranted a finding that such user had been permissive and not adverse.¹⁰³

There is a distinction between a servitude or easement imposed upon land, and a covenant real running with the land, but this distinction has not always been observed by conveyancers and judges.¹⁰⁴ An easement of a right of way is not presumed to be personal, where it can fairly be construed to be appurtenant to some other estate.¹⁰⁵ When there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined with relation to other estates of the grantor, or its want of such relations. The "*terminus ad quem*" is of special significance.¹⁰⁶

Various cases have arisen as to the right of the owner of land subject to an easement, in the nature of a right of way, to build or project structures over the way, and these cases have all been decided upon the same general principles, viz: That a man who owns land subject to an easement has the right to use land in any way which is not inconsistent with the easement and the extent and scope of the easement claimed must be determined by the true construction of the

¹⁰¹ Blake v. Everett, 1 Allen (Mass.), 248.

¹⁰² Burnham v. McQuesten, 48 N. H. 446.

¹⁰³ Id.

¹⁰⁴ West Virginia Trans. Co. v. Ohio River P. L. Co., 22 W. V.

600; Woodruff v. Trenton Water Co., 10 N. J. Eq. 489.

¹⁰⁵ Washb. Easem. 29, 161; Louisville & N. R. R. Co. v. Koelle, 104 Ill. 455; Dennis v. Wilson, 107 Mass. 591; Smith v. Porter, 10 Grey (Mass.), 66.

¹⁰⁶ Garrison v. Rudd, 19 Ill. 558.

grant or reservation by which it is created, aided by any circumstance, extrinsic or otherwise, which can cast light on the transaction or has a tendency to show the intendment of the parties at the time the easement was created.¹⁰⁷

b. *How acquired.* A right of way over another's land may be acquired:

1. By grant from the owner of the soil.
2. By long continued use or prescription.
3. By actual necessity.

To gain a permanent right by grant, it must have been created by deed, but it conveys no right to the soil, rocks, or other things within the bounds of the way.

Chancellor Kent generalizes upon this subject with unrivalled felicity. At page 551 of the 10th edition I find the following: "This incorporeal hereditament is a right of private passage over another man's ground. It may arise either by grant of the owner of the soil, or by prescription, which supposes a grant, or from necessity. If it be a freehold right, it must be created by deed, though it be only an easement upon the land of another, and not an interest in the land itself. A right of way *ex vi termini* imports a right of passing in a particular line, and not the right to vary it at pleasure, and go in different directions. This would be an inconvenience to the owner of the land charged with the easement, and an abuse of the right. It is likewise a principle of law, that nothing passes as incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. If it be a right of way in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and it is so exclusively personal, that the owner of the right cannot take another person in company with him. But when a right of way is appendant or annexed to an estate, it may pass by assignment when the land is sold to which it is appurtenant. A right of way may arise from necessity in several respects. Thus, if a man sells land to another, which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at

¹⁰⁷ *Atkins v. Boardman*, 2 Met. 132 Mass. 235; *Brooks v. Reynolds*, (Mass.), 457; *Garrish v. Shattuck*, 106 Mass. 31.

his own land. The way is a necessary incident to the grant, and without which the grant would be useless."

c. *Rule as to street railways.* Where one owns to the center of a street in a city, it has been held that the laying of the rails for a horse railroad imposed an additional burden upon the land forming the street, for which the owner was entitled to compensation.¹⁰⁸ Although relief was denied a plaintiff who did not own the fee, and who desired to enjoin the use of the street by a horse railroad company, it was denied upon the ground that there was no taking of the property of the plaintiff by the company, and that being authorized by the Legislature the plaintiff could not complain.¹⁰⁹ The plaintiff sought in that action to recover damages for inconvenience of access to his adjoining lands. In the *Craig* case, *supra*, the case was decided upon the idea that there was an exclusive occupation of the street, which amounted to an additional burden upon the land. The cases upon the subject of railroads in streets are cited and commented upon in *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505; 8 L. R. A. 453; *Kane v. New York Elev. R. Co.*, 125 N. Y. 164; 11 L. R. A. 640; and *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157; 14 L. R. A. 133, and they show that the primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals, or vehicles, and a place by which to afford light, air, and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently, and, to some extent, exclusively, appropriated by the elevated railroads, that it was held their erection, without the consent of the abutting owners, was illegal.¹¹⁰

The great weight of opinion thus far expressed by courts

¹⁰⁸ *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404.

¹⁰⁹ *Kellinger v. Forty-Second St. and G. Street Ferry R. Co.*, 50 N. Y. 206.

¹¹⁰ *Story v. New York Elev. R. Co.* 90 N. Y. 122; 43 Am. Rep. 146.

is that street railways, with cars propelled by horse-power, are not to be regarded as imposing a new servitude which will entitle the owner of the fee of the highway to additional compensation, but that steam railroads are to be so regarded. It is considered that the latter use is so far different in its nature, that the law ought to take notice that it could not have been within the contemplation of the parties that the laying out of an ordinary highway should also include such a mode of traveling. While it is always recognized that the proper and contemplated use of the highway is not to be deemed limited to such vehicles as are in use at the time, it is considered to be too great an extension of the easement acquired by the public to hold that it embraces its use for a steam railway. At this point the line has been drawn by a great weight of judicial decision.¹¹¹

The use of a highway for the purpose of communicating information by electricity, by means of posts and wires erected along its course, may, in a certain sense, be said to be a use for a purpose similar to that for which highways are established; namely, the increase of communication between persons at different points. But this is a somewhat remote analogy, and the more direct purpose of establishing highways is to enable persons and teams to pass more easily from one place to another. The analogy between a steam railway and conveyance by ordinary teams is much more direct.

The multiplication of telegraph and telephone posts and wires in thickly settled places within the past few years makes the question at issue one of great importance. There can be no doubt that in many instances an actual injury is done to the remaining or abutting land along a highway or

¹¹¹ See *Williams v. N. Y. C. Railroad*, 16 N. Y. 97; *Wager v. Troy Union Railroad*, 25 N. Y. 526, 535; *Jersey City & Bergen Railroad v. Jersey City & Hoboken Horse Railroad*, 5 C. E. Green, 61; *Imlay v. Union Branch Railroad*, 26 Conn. 249, 255; *Grand Rapids & Indiana Railroad v. Heisel*, 38 Mich. 62; *Sherman v. Milwaukee, Lake Shore*

& Western Railroad, 40 Wis. 645; *Kucheman v. Chicago, Clinton & Dubuque Railway*, 46 Iowa, 366; *Kaiser v. St. Paul, Stillwater & Taylor's Falls Railroad*, 22 Minn. 149; *Southern Pacific Railroad v. Reed*, 41 Cal. 256; *Cooley's Const. Lim.* 546, 550; 2 *Dill. Mun. Corp.* sec. 722, 725.

street by the erection of such posts and wires; and the extent to which this may be carried in the future cannot easily be foreseen. When a telegraph line consisted of only a single row of small posts with a few wires, the matter was of less importance. But common observation shows that now the posts are large and numerous, fitted with cross beams adapted for layer after layer of almost countless wires, and the establishment of the different kinds of electrical lines involves to some extent a destruction of trees along the highways or streets, an occupation of the land, a filling of the air, an interference with access to or escape from buildings, an increased difficulty in putting out fires, an obstruction of the view, a presentation of unsightly objects to the eye, and a creation of unpleasant noises in the wind. The actual injury thus done to adjoining property may certainly be quite serious; and if, when land is taken or granted for a highway, it is understood that such use may also be made of it, there can be no doubt that in many instances a very substantial increase of compensation would justly be granted to the owner; because, in assessing damages when land is taken for a highway, it is not merely a question what the land actually taken is worth, or what will be the extent of the injury from the deprivation of its use, but the owner is also entitled to compensation for the incidental injury to his remaining land, which is to be estimated with reference to the use for which the land taken from him is to be appropriated, and such damages are to be allowed to him as will fairly compensate him in view of the purposes of the appropriation.¹¹²

Heretofore the consequential injury to the remaining land of the owner, arising from the possibility of a future use of the highway for telegraph and telephone wires, has never been considered as a proper element of damages. No case is cited or known where it has been held, or even contended by counsel, that damages should be included for such possible use.

d. *Of ways of necessity.* This right arises from presumption of law that the parties did not intend that land to which

¹¹² Walker v. Old Colony & Newport Railway, 103 Mass. 10, 14; Johnson v. Boston, 130 Mass. 452, 454.

the owner had no access should be retained or conveyed. It arises in favor of a parcel of land when the same is surrounded by other land of the grantor, or partly by his land and that of a stranger.¹¹³ The rule allowing ways of necessity contemplates but one mode of access.¹¹⁴ And if the party acquires a new right of way by a suit in partition or otherwise, the former right of way by necessity is extinguished.¹¹⁵ It is extinguished whenever it ceases to be a way of necessity and becomes one of convenience.¹¹⁶

In *McDonald v. Lindall*, 3 Rawle (Pa.), 492, it is said: "The right of way is always of strict necessity, and this necessity must not be created by the party claiming the right of way. It never exists when a party can get to his property through his own land. That the way through his own land is too steep or too narrow does not alter the case."

A right of way may arise from necessity in several instances, and such a right may inure to a grantor even in cases where he has conveyed with full covenants of warranty.¹¹⁷

Chancellor Kent says:¹¹⁸ "The weight of authority is, that the grantor has a right of way to his remaining land, in case of necessity, when he cannot otherwise approach his land. The law presumes a right of way reserved, or rather gives a new way, from the necessity of the case, and the new way ceases with the necessity for it."

The owner of premises so circumstanced, having no other means of access or egress, has the right of a way of necessity so long as his lands remain in a state of isolation. When, however, by the opening of a highway or the purchase of other land abutting on a highway the owner can reach all parts of his property by passing over his own land, this way

¹¹³ *Taylor v. Warnaky*, 55 Cal. 350; *Trask v. Patterson*, 29 Me. 499; *Bass v. Edwards*, 126 Mass. 445; *Tracy v. Watheton*, 35 Vt. 52; *Marshall v. Trumbull*, 28 Conn. 183; *Lore v. Stiles*, 25 N. J. Eq. 381.

Abbott v. Stewartson, 47 N. H. 230.
¹¹⁶ *Pierce v. Shellack*, 18 Conn. 321; *Viall v. Carpenter*, 14 Grey, 126.

¹¹⁷ *Smyles v. Hastings*, 22 N. Y. 217; *Kimball v. Cochecho R. R. Co.*, N. H. 448.

¹¹⁴ *Kings Co. F. Ins. Co. v. Stevens*, 101 N. Y. 411.
¹¹⁸ *Cushing, C. J.*, in *Pingree v. McDuffie*, 56 N. H. 306.

¹¹⁵ *Carey v. Rae*, 58 Cal. 159;

of necessity over the lands of others terminates, and the mere matter of convenience is neither controlling nor important.¹¹⁹

A railroad location is, generally speaking, exclusive, so far as the public are concerned. Of course emergencies arise by which all exclusive right is abrogated, as where the imminency of flood or fire make it imperatively necessary that the company's land should be invaded. No enumeration will be attempted of the occasions upon which it might be admissible for the general public to pass over or along the railroad location, but the peculiar circumstances of each case will disclose the degree of necessity.¹²⁰

What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant, the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied.

As said by Marshall, C. J., in *Maxwell v. McAtee*, 9 B. Mon. 21: "Notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation to his right is essential to the fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him, because they are not granted. And for the same reason, the exercise of any of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor, but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment."

In that case it was decided that "the grant of a right of way over or through the lands of an individual, does not imply that the grantor may not erect gates at the points, where the way enters and terminates." That decision

¹¹⁹ *Pierce v. Selleck*, 18 Conn. 321; *New York Life Ins. Co. v. Milnor*, 1 Barb. Ch. 354; *Abbott v. Stewart's Town*, 47 N. H. 228.

¹²⁰ *Metalic C. C. Co. v. Fitchburg R. R. Co.* 109 Mass. 277.

has been approved by courts of high authority in other States.¹²¹

The court say, in *Lawton v. Rivers*, 2 McC. (S. C.), L. 445: "It is indeed said that what is called a right of way from necessity is by grant; because where a thing is granted, the law implies a grant of everything necessary to the enjoyment of it."¹²² But still I think the three-fold distinction above mentioned may be preserved, because it is from the necessity of the thing that the law implies a grant. To establish such right, nothing is required but to show the necessity. Neither time nor occupation is necessary. If the necessity has existed but for a day, the claim is as well founded as where it had existed for half a century; and although the right may never have been enjoyed, yet its existence will be co-extensive with the necessity. But there must be an actual necessity, and not a mere inconvenience, to entitle a person to such right. One man is not required to subject himself to an inconvenience, and much less to an actual loss, for the accommodation of another. I do not mean to say that there must be an absolute and irresistible necessity; as inconvenience may be so great as to amount to that kind of a necessity which the law requires, and it is difficult, and perhaps impossible, to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity."

e. *Miscellaneous authorities on the subject.* If a way is granted for a particular use, it must be used for that purpose alone. Thus, where one was granted a way to haul wood over it, it was held that stone could not be hauled. Such use would be an inconvenience to the owner of the land charged with the easement, and an abuse of the right. As was well put by Judge Bell,¹²³ "The grantee of a way is limited to use his way for the purposes and in the manner specified in

¹²¹ *Bean v. Coleman*, 44 N. H. 539; *Garland v. Farber*, 47 N. H. 301; *Hoopes v. Alderson*, 22 Iowa, 161; *Bakeman v. Talbot*, 31 N. Y. 366, 370, 371; *Huson v. Young*, 4 Lans. 63.

¹²² *Pomfrit v. Ricroft*, 1 Saund.

323; *Saunder's Case*, 5 Co. 12; *Howton v. Frearson*, 8 Durnf. & E. (8 T. R.), 50; S. C. 4 Rev. Rep. 581; 5 *Jacob's Law Dict.* 465.

¹²³ *French v. Martin*, 24 N. H. 440, 449.

his grant. He cannot go out of his way, nor use it to go to any other place than that specified, if the use in this respect is restricted."

The leading case on this subject is *Atkins v. Bordman*, 2 Met. (Mass.), 457, in which the whole subject of rights of way and their limitations was ably examined by Chief Justice Shaw, of Massachusetts. We quote a few words from his elaborate opinion: "An easement of way consists in the right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for the use. But the owner of the soil has all the rights and benefits of the ownership, consistent with such easement. All which the person having the easement can lawfully claim is the use of the surface for passing and repassing, with a right to enter upon and prepare it for that use by levelling, gravelling, ploughing, or paving, according to the nature of the way granted or reserved; that is, for a foot way, a horse way, or a way for all teams and carriages. If the way is not bounded or limited, or there be no one in existence, the grant of a way would be, in point of width and height, such as is reasonably necessary and convenient for the purposes for which it is granted. If a foot way, it shall be high and wide enough for persons to pass with such things as foot passengers usually carry. If for teams and carriages, it shall be sufficient to admit carriages of the largest size, or loads of hay and other vehicles usually moved by teams."

It was long ago held, in a very able opinion by Chief Justice Shaw, that, where a way is established by adverse use alone, a jury might be justified in finding that the way extended beyond the part wrought and actually used for travel, and might include land which by reason of its formation or the existence of obstacles could not have been used for travel.¹²⁴

Still, we do not doubt that it is generally true that when an easement of any kind is obtained by adverse use alone, its extent must be measured by its use. But this rule does not apply to ways which have commenced under an actual

¹²⁴ *Sprague v. Waite*, 17 Pick. (Mass), 309.

and a recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law. In such cases, the use is presumed to be co-extensive with the location, precisely as possession under an invalid deed is presumed to be co-extensive with the land purporting to have been conveyed by it. This result is sometimes reached by the presumption of a dedication, and sometimes by the presumption that the proceedings were all regular.

In Maine the latter mode has been adopted. Thus, in *Gibbs v. Larrabee*, 37 Me. 506, where the records of the town failed to show a compliance with all the requirements of the law, still, inasmuch as the location had been acquiesced in for a long series of years, the court held that an inference might fairly be drawn that all the requirements of the statute had in fact been complied with, and sustained the location on that ground. The point to be particularly noticed in this decision is the fact it was the way originally located that was sustained, not such a way merely as had been used. It is the location *de facto* that by the lapse of time ripens into a location *de jure*. To rest such a result on the presumption of regularity is to rest it on a fiction.

It appears from the adjudications: 1, That the conveyance of a right of way gives to the grantee not only a right to an unobstructed passage at all times over defendant's lands, but also such rights as are incident or necessary to the enjoyment of such right or passage.¹²⁵ 2, The owner of the way where its limits are defined, has only the rights of a free passage on such portions of the way as he thinks proper or necessary.¹²⁶ 3, The owner of the fee, subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement.¹²⁷ 4, The rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil.¹²⁸

¹²⁵ *Maxwell v. McAtee*, 9 B. Mon. 21; *Bliss v. Greeley*, 45 N. Y. 671; *Herrman v. Roberts*, 119 N. Y. 37; 7 L. R. A. 226.

¹²⁶ *Herrman v. Roberts*, *supra*.

¹²⁷ *East Tennessee V. & G. R. Co. v. Telford* (Tenn.), 14 S. W. Rep.

776; *Herrman v. Roberts*, *supra*; *Cooley Const. Lim.* 691.

¹²⁸ *Herrman v. Roberts*, *supra*; *East Tennessee V. & G. R. Co. v. Telford*, *supra*; *Kansas. Cent. R. Co. v. Allen*, 22 Kan. 285.

5, The owner of the soil is under no obligation to repair the way, as that duty belongs to the party for whose benefit it is constructed.¹²⁹ 6, What may be considered a reasonable and proper use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to plaintiff's beneficial use and enjoyment, are questions of fact to be determined by the trial court or jury.¹³⁰

In *Herrman v. Roberts*, *supra*, decided in 1880, the court says: "It cannot be assumed, in the absence of any provision looking thereto in the grant, that the grantor intended to reserve any use of the land which should limit or disturb the full and unrestricted enjoyment of the easement granted. The purpose contemplated by the grant was the creation of an easement for the plaintiff's use and not the reservation to the owner of the use of his land. Every use by the owner was abandoned except such as might be made in a mode entirely consistent with the full and undisturbed enjoyment by the grantee of the easement. The idea of a joint use of the land by both parties, in the sense that a use by the grantee should at any time give way to a use by the grantor, is contrary to the plain meaning and intent of the grant. The use of the land, says the court, for agricultural purposes, is clearly inconsistent with the rights acquired by plaintiff."

Right of way cannot be transferred to a different user. The right cannot be transferred for a different user and for a right of way for railroad purposes without express authority of law.¹³¹

According to the English law, a right of way cannot strictly be made the subject of an exception or a reservation, because, as stated by Chief Justice Tindal, in *Durham & S. R. Co. v. Walker*, 2 Q. B. 940, 967, "it is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception and the latter to a reservation." If, therefore, an easement is excepted or reserved in a deed, it operates by way of a grant from the

¹²⁹ *Herrman v. Roberts*, *supra*.

¹³⁰ *Bakeman v. Talbot*, 31 N. Y. 366; *Huson v. Young*, 4 Lans. 64; *Prentice v. Geiger*, 74 N. Y. 342;

Herrman v. Roberts and *Kansas Cent. R. Co. v. Allen*, *supra*.

¹³¹ *Lance's Appeal*, 55 Pa. 16.

grantee to the grantor.¹³² In such a state of the law, the word "heirs" must be used to create an easement in fee. In this commonwealth, however, an easement may be created by way of exception or reservation.¹³³ If created by way of reservation, the word "heirs" is necessary to create an easement in fee.¹³⁴ But if created by way of exception, the word "heirs" is not necessary to create an easement in fee, if the grantor owned the fee at the time of the conveyance.¹³⁵ As an exception may be created by words of reservation,¹³⁶ but little reliance can be placed upon the language used in determining whether the right is by way of exception or reservation. In *Bean v. French*, 140 Mass. 227, one Merrifield, being the owner of a large tract of land, conveyed a part of it to the plaintiff's predecessor in title, by a warranty deed containing the usual covenants, and also the following clause: "Reserving, however, to myself the privilege of a bridle path in front of the house." This was held to be a reservation, and not an exception, on the ground that the effect of the clause was to create a right or easement not before existing, and the right which Merrifield had to pass and repass over any part of his estate, while he owned the whole of it, was held to be not an existing right of way over that part sold to the plaintiff's predecessor in title. In *White v. New York & N. E. R. Co.*, *supra*, where the easement was held to be perpetual, the language was: "Reserving the passageway at grade over said railroad where now made." The defendant had also previously taken the land by its location. In deciding that the right of way was by way of exception, and not by way of reservation, reliance is placed on all these facts, including the fact that the passway was already existing when the deed was executed.

Although a way may not have been dedicated to the public or otherwise legally established for the use of the public, yet

¹³² *Id.*; see also *Goold v. Great Western Deep Coal Co.* 2 DeG. J. & S. 600; *Finlinson v. Porter*, L. R. 10 Q. B. 188.

¹³³ *Bowen v. Conner*, 6 Cush. 132. and cases *infra*.

¹³⁴ *Ashcroft v. Eastern R. Co.* 126

Mass. 196, 30 Am. Rep. 672; *Bean v. French*, 140 Mass. 229.

¹³⁵ *Wood v. Boyd*, 145 Mass. 176; *White v. New York & N. E. R. Co.* *supra*.

¹³⁶ *Wood v. Boyd*, *supra*.

if the owner of premises over which it passes has exhibited an intention that it shall be used by the public, either as a means of access to his property or over it, and, by the manifestation of that intention, has induced or allured the public to its use, then those using it within the scope of the purpose manifested are entitled to be protected from dangers to the way, by reason of obstructions or interferences created during its existence, and resulting from the want of ordinary care on the part of the owner or those acting within his authority.¹³⁷

This principle, however, must be distinguished from that of a mere permission to pass over lands.¹³⁸

"It is a general rule that, upon a conveyance of land, whatever is in use for it as an incident or appurtenance passes with it. The law gives such a construction to the conveyance in view of what is thus used for the land as an appurtenance or incident, that the latter is included in it. Whether a right of way or other easement is embraced in a deed, is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance."¹³⁹ But nothing passes which is not appurtenant to the land granted and directly necessary to its enjoyment.¹⁴⁰

This principle is now firmly established. It was indicated in *New Jersey R. & Transp. Co. v. West*, 32 N. J. L. 91, and distinctly held in *Vanderbeck v. Hendry*, 34 N. J. L. 467, and the liability is based "on a purpose manifested on the part of the owner that a way shall be used by the public, and the same is held out as a means of access to a house, store, or other passage through lands, and the public, or such as have occasion, are expressly or impliedly invited to use it accord-

¹³⁷ *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Corby v. Hill*, 4 C. B. (N. S.) 556; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 369, 87 Am. Dec. 644; see *New Jersey R. & Transp. Co. v. West*, 32 N. J. L. 91.

¹³⁸ *Hounsell v. Smith*, 7 C. B. (N. S.), 731; *Binks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 244; *Gautret v. Egerton*, L. R. 2 C.

P. 370; *Stone v. Jackson*, 16 C. B. 199; *Bolch v. Smith*, 7 Hurlst. & N. 736; *Nicholson v. Erie R. Co.* 41 N. Y. 525, are cases to the same effect elsewhere.

¹³⁹ *Huttemeier v. Albro*, 2 Bosw. 546; s. C. 18 N. Y. (4 Smith), 48.

¹⁴⁰ *Leonard v. White*, 7 Mass. 6; *Coleman's Appeal*, 62 Pa. St. 252.

ing to the purpose intended.”¹⁴¹ This whole subject has recently undergone extensive treatment in the Court of Errors and Appeals of the State of New Jersey, in *Phillips v. Burlington Library Co.*, 55 N. J. L. 307. In that case the leading authorities are reviewed, and the doctrine stated by Mr. Justice Depue is that mere permission to pass over dangerous lands, or acquiescence in such passage, for the benefit and convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts willfully injurious. But the owner or occupier of lands, who, by intention, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or the use of the premises dangerous. The gist of the liability, in such cases, consists in the fact that the person injured did not act merely on motion of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted, and prepared or allowed to be used.

§ 197. Easements of Light and air. Light and air are in one sense common property. The owner of a house may construct it with as many windows as he desires, and thus secure all the light and air that he can. But his neighbor has the corresponding right to build his house in such position on his own land as he chooses, and the result of this may be to darken the windows of the house adjoining. But this is *damnum absque injuriâ*. The neighbor has committed no unlawful act, and the first builder has no right to complain. But if A., the first builder, had enjoyed for twenty years or more the unobstructed passage of light to his windows, then he has acquired by prescription (some courts have held) the right to its unobstructed enjoyment, and if B. thereafter erects any structure which substantially diminishes A.'s light

and injures the enjoyment of his estate, it is a nuisance which equity will require him to remove.

Such is the law in England, and such was the law at one time in Massachusetts, but this doctrine was denied in other States, and it is now entirely repudiated in Massachusetts. It is settled in that State that the owner of a house does not acquire by lapse of time any prescriptive right, as against the owner of the adjacent land, to have his windows unobstructed. In *Keates v. Huge*, 115 Mass. 204, the court quote with approval what was said in the leading case of *Parker v. Foote*, 19 Wend. 309, namely: "The English doctrine of acquiring a right to light by prescription is without foundation in principle, not adapted to the existing state of things in the United States, and could not be applied in the growing cities and villages of this country without working the most mischievous consequences."¹⁴²

Nor is a grant of such easement to be implied from the grant of a house having windows overlooking land retained by the grantor.¹⁴³ There are authorities the other way.¹⁴⁴

Air. In a general way, it may be said that every one is entitled to the enjoyment of the air undefiled by his neighbor.

It is also true as a general proposition that whoever, by noisome or injurious works or otherwise, renders the air so offensive or unwholesome as seriously to injure another in the enjoyment of his estate, commits a private nuisance which equity will enjoin.

Of course, in a populous community this right to pure air must be taken in a very modified sense, and subject to the absolute necessities and requirements of large towns and cities.¹⁴⁵ Nevertheless, so far as the protection of dwelling

¹⁴² *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111; *Cherry v. Stein*, 11 Md. 1; *Hubbard v. Town*, 33 Vt. 295; *Holley v. Security Trust Co.* 5 Del. Ch. 578; *Pierre v. Fernald*, 26 Me. 436; *Lapere v. Luckey*, 23 Kans. 534; *Guest v. Reynolds*, 68 Ill. 478, overruling *Gerber v. Grabel*, 16 Ill. 217.

¹⁴³ *Keats v. Hugo*, *supra*; *Morri-*

son v. Marquardt, 24 Iowa, 35; *Mullen v. Stricker*, 19 Ohio St. 135; *Rennyson's Appeal*, 94 Pa. St. 147; *Keiper v. Klein*, 51 Ind. 316.

¹⁴⁴ *Phillips v. Low* (1892), 1 Ch. 47; see *Sutphen v. Therkelson*, 38 N. J. Eq. 318, where the cases are collected.

¹⁴⁵ *Rhodes v. Dunbar*, 57 Pa. St. 274; see *infra*, p. 438.

houses is concerned, the rule exists in full force, subject to this single modification; it is not every slight or casual annoyance or inconvenience which a court of equity will take notice of, but the court will suppress any trade or business by which the air of a dwelling house is rendered continuously, or in any substantial degree, unwholesome or offensive.¹⁴⁶ "What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction."¹⁴⁷

If the annoyance is such as materially to interfere with the ordinary comfort of human existence, equity will enjoin it.¹⁴⁸ But the inconvenience must be "more than fanciful, more than one of mere delicacy or fastidiousness, * * * an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people."¹⁴⁹ Hence an undertaker's shop is not, in the legal sense, a nuisance.¹⁵⁰

This annoyance may arise from unwholesome vapors.¹⁵¹ A slaughter house is *prima facie* a nuisance.¹⁵² In *Boston Ferrule Co. v. Hills*, 159 Mass. 147, the plaintiff, doing business on a lower floor, obtained an injunction to restrain the defendant, on the floor above, from allowing sand and the fumes of noxious acids to descend through holes in the floor (made for the passage of belting), thus injuring the plaintiff's goods. Even though the injury be to ornamental trees only, an injunction will be granted,¹⁵³ or from disagreeable although not positively unwholesome odors,¹⁵⁴ or from smoke, or from excessive noise and vibration.¹⁵⁵ "Nuisance by noise is em-

¹⁴⁶ Fay v. Whitman, 100 Mass. 76.

¹⁴⁷ Fleming v. Hislop, L. R. 11 App. Cas. 686, 697.

¹⁴⁸ Crump v. Lambert, L. R. 3 Eq. 409.

¹⁴⁹ Walter v. Selfe, 4 DeG. & S. 315, 322; see also Tuttle v. Church, 53 Fed. Rep. 422.

¹⁵⁰ Westcott v. Middleton, 43 N. J. Eq. 478.

¹⁵¹ Barnes v. Hathorne, 54 Me.

124; Meigs v. Lister, 23 N. J. Eq. 199.

¹⁵² Bushnell v. Robeson, 62 Iowa, 540.

¹⁵³ Campbell v. Seaman, 63 N. Y. 568.

¹⁵⁴ Ross v. Butler, 19 N. J. Eq. 294; Adams v. Ohio Falls Car Co. 131 Ind. 375.

¹⁵⁵ Crump v. Lambert, *supra*; Wesson v. Washburn Iron Co. 13

phatically a question of degree;"¹⁵⁶ but whenever it amounts to a serious and continuous disturbance it will be enjoined. So, also, it will be enjoined when the nuisance appreciably affects the value of the land.¹⁵⁷

a. *The English doctrine considered.* The English doctrine is that "if one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows."¹⁵⁸ This doctrine, however, does not prevail in the majority of the American States. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon as he has permitted the light and air to pass over it into the windows of his neighbor's house, situated upon the adjoining lot.

The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription.¹⁵⁹ The Gerber case was, in effect, overruled, and it was held that a prescription right might be so acquired; but in the latter case of *Guest v. Reynolds*, 68 Ill. 478; 18 Am. Rep. 570, the Gerber Case was, in effect, overruled, and it was held that a "prescriptive right springing up under the narrow limitations in the English law, to prevent obstructions to window lights, cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed part of our law." It is established by the weight of American authority that a grant of the right to the use of light and air

Allen, 95, *supra*; Dittman v. Repp, 50 Ind. 516; Fish v. Dodge, 4 Den. 311; Demarest v. Hardham, 34 N. J. Eq. 469.

¹⁵⁶ Gaunt v. Fynney, L. R. 8 Ch. App. 8, 12.

¹⁵⁷ Hennessy v. Carmony, 50 N. J. Eq. 616.

¹⁵⁸ Washb. Easem. 492, par. 5.

¹⁵⁹ 2 Woodfall, Land. & Ten. 703, and notes; 1 Taylor, Land. & Ten. secs. 239, 380, and notes; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 570.

will not be implied from the conveyance of a house with windows overlooking the land of the grantor; and that, where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property.¹⁶⁰ "A grant by the owner of two adjoining lots, of either one of them, does not imply the right of an unobstructed passage of light and air over the other."¹⁶¹ "The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another."¹⁶² It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so.¹⁶³

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement.¹⁶⁴

Implied grant. No prescriptive right to the use of light and air through windows can be acquired by any length of use and enjoyment.¹⁶⁵ The law of implied grants, as laid down in some of the early English cases, has no application with us, and the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air, over the premises of another in any case. In this country real property is constantly appreciating, and as constantly being conveyed from one owner to another. It is being frequently subjected to

¹⁶⁰ *Keats v. Hugo, and Mullen v. Stricker, supra*; 1 Wood. Land. & Ten. sec. 209, 422-424, and note; *Morrison v. Marquardt*, 24 Iowa, 35, and 92 Am. Dec. 444.

¹⁶¹ 2 Woodfall, Land. & Ten. 703, note.

¹⁶² *Mullen v. Stricker, supra*; *Haverstick v. Sipe*, 33 Pa. 368; *Keiper v. Klien*, 51 Ind. 316.

¹⁶³ *Myers v. Gemmel*, 10 Barb.

537; *Palmer v. Wetmore*, 2 Sandf. 316; *Keiper v. Klien, supra*; 2 Woodfall, Land. & Ten. 703, and note.

¹⁶⁴ *Hilliard v. New York & C. Gas Coal Co.* 41 Ohio St. 662, 52 Am. Rep. 99; *Brooks v. Reynolds*, 106 Mass. 31; *Keats v. Hugo and Morrison v. Marquardt, supra*.

¹⁶⁵ *Hieatt v. Morris*, 10 Ohio St. 523; *Washb. Easem.* 497.

the most expensive forms of improvement, and a perpetual easement for light and air would effectually destroy the sale of a servient tenement burdened with such an easement. The authorities on this subject are far from uniform but the better reasoned cases quite generally hold to the textual views above expressed.¹⁶⁶ In the case first cited the court propounds this interrogatory, viz: "How can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enjoyment of a man's house, according to the demands of a growing and improving family?"

The purchaser of a home in some congested district never supposes that his neighbor will have a right to prevent him from changing the form of it according to his taste.

The easements of light, air, and access, pass to the purchaser whether he acquires his title by will or deed.¹⁶⁷

b. *The English doctrine repudiated in this country.* The English doctrine is generally repudiated in this country. In *Parker v. Foote*, 19 Wend. 309, which has been followed in several of the States, the court said: "There is, I think, no principle on which the English doctrine on the subject of lights can be supported. It is an anomaly of the law. It may do well enough in England * * * but it cannot be applied to the growing cities and villages of this country, without working the most mischievous consequences." The English doctrine, however, seems to be countenanced in Delaware,¹⁶⁸ and possibly in some other States.

This doctrine of easements in light and air, founded upon

¹⁶⁶ See *Haverstick v. Sipe*, 33 Pa. St. 368; *Palmer v. Wetmore*, 2 Sandf. 316; *Collier v. Pierce*, 7 Gréy, 18; *Dodd v. Burchell*, 1 H. & C. 112.

¹⁶⁷ *Story v. New York Elev. R. Co.* 90 N. Y. 145; *Hills v. Miller*, 3 Paige, 254, 3 L. ed. 141; *Child v. Chappell*, 9 N. Y. 246; *Taylor v. Hopper*, 62 Id. 649; *Arnold v. Hudson River R. Co.* 55 Id. 661; *Glover v. Manhattan R. Co.* 19 Jones & S. 1; *Rolf v. Rolf*, 5 Coke,

101a; *Penruddock's case*, 5 Coke, 100; *Griswold v. Metropolitan Elev. R. Co.* 122 N. Y. 102; *Broiestedt v. South Side R. Co.* 55 Id. 220; *Corning v. Troy I. & N. Factory*, 40 Id. 192; *Crippen v. Morse*, 49 Id. 63; *Shepard v. Manhattan R. Co.* 117 Id. 442; *Dean v. Metropolitan Elev. R. Co.* 119 Id. 546; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 119.

¹⁶⁸ *Clawson v. Primrose*, 4 Del. Ch. 643.

sheer necessity and convenience, like the kindred doctrine of "ancient windows," or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty, and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual encumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts.

We know that the authorities on this subject are not uniform. But we believe the weight of American decisions is in accordance with the opinion here expressed.¹⁶⁹

In *Haverstick v. Sipe*, the court held that the grant of an easement for light and air is not implied from the fact that such a privilege has been long enjoyed; and that a contract for such privilege is not implied on the sale of a house and lot, from the character of improvements on the lot sold, and the adjoining lots. The court say: "There is a sort of necessity for such an implication relative to other apparent easements, such as roads and alleys, in order to account for a use of another man's land that would otherwise be a wrongful encroachment; and the implication is easily framed or defined, for it appears on the ground, But how can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enjoyment of a

¹⁶⁹ See *Maynard v. Esher*, 17 Pa. 537; *Palmer v. Wetmore*, 2 Sandf. St. 222; *Haverstick v. Sipe*, 33 Id. Sup. C. R. 316; *Collier v. Pierce*, 7 368, 371; *Dodd v. Burchell*, 1 H. & Gray, 18. C. 112; *Myers v. Gimmel*, 10 Barb.

man's house, according to the demands of a growing or improving family. A purchaser of a house in a crowded town never supposes that his neighbor will have a right to prevent him from changing the form of it according to his taste."

c. *Right to light and air regarded as an easement.* The right to light and air passing over land is an easement, whether acquired by prescription or otherwise.¹⁷⁰ A way "reserved" as the word is used in a popular sense, is strictly an easement newly created by way of grant from the grantee in the deed of the estate to the grantor.¹⁷¹ In the case last cited Chief Justice Shaw says: "There is no doubt that by apt words, even in a deed poll, a grantor may acquire some right in the estate of the grantee. It is not, however, strictly by way of reservation, but by way of condition or implied covenant, even though the term 'reserving' or 'reservation' is used." The court adhered to this ruling in the subsequent case of *Bowen v. Conner*, 6 Cush. (Mass.), 132, declaring that "it is immaterial whether the easement for the way intended to be established is technically considered as founded on an exception, a reservation, or an implied grant." Vice Chancellor Van Fleet, in *Coudert v. Sayre*, 46 N. J. Eq. 386, expresses his view of the rule as follows: "When, by the construction of a grant, it appears that it was the intention of the parties to create or reserve a right in the nature of a servitude in the land granted, for the benefit of other land owned by the grantor, no matter in what form such intention may be expressed, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees." The tendency of the adjudications on this subject is properly to disregard technical distinction between reservation and exception, and construe the language used so as to effectuate the intention of the parties. A covenant or stipulation inserted in a deed poll binds the grantee, his heirs and assigns, where such stipulation relates to the prem-

¹⁷⁰ Goddard, Easem. 33.

Wickham v. Hawker, 7 Mees. & W.

¹⁷¹ Washb. Easem. 20; *Durham & S. R. Co. v. Walker*, 2 Q. B. 940;

75; *Dyer v. Sanford*, 9 Met. (Mass.), 395, 43 Am. Dec. 399.

ises conveyed. The easement in such case may be acquired by a clause of reservation.¹⁷²

And the grantee in a deed and those claiming under him cannot deny the binding authority of a reservation in a deed.¹⁷³

d. *Extended review of the Elevated Railroad cases — Opinions of eminent jurists.* The New York Elevated Railroad cases are notable in several respects. First, Because decided by the most competent tribunals in this or any other land; and, Secondly, Because the decision in these cases admits an easement in light and air; establishes the right of an abutting owner to something more than ingress and egress, and clears away a mass of rubbish in the form of "*opinions*" that had been accumulating in various State reports holding the *contra* view. They bear every evidence of discriminating and scholarly research, critical analysis and logical presentation. Here we have established beyond demur or cavil that no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public uses as a street forever (and the public can get no greater right under a dedication), and no matter who may own the fee, "an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property which belong to him by reason of its location and are not enjoyed by the general public, such as the right to free access to his premises, and the free admission and circulation of light and air to and through his abutting premises."¹⁷⁴ The latter case was really a reargument of the questions decided in the earlier, and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it. It will be vastly interesting to the legal profession of the country to know what disposition of

¹⁷² *Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Cooper v. Louanstein*, 37 N. J. Eq. 284; *Newhoff v. Mayo*, 48 N. J. Eq. 619; *Rosenkrans v. Snover*, 19 N. J. Eq. 420, 97 Am. Dec. 668.

¹⁷³ *Sheppard v. Hunt*, 4 N. J. Eq.

277; *Fitzgerald v. Faunce*, 46 N. J. L. 598.

¹⁷⁴ *Story v. New York Elevated R. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elevated R. R. Co.* 104 N. Y. 268.

this question the Massachusetts court will make when confronted with a similar issue.

The Rapid Transit Act of New York (Laws of 1875, chap. 606, p. 740, sec. 26), under which the elevated railroads of that State were constructed, provided that "in all cases the use of the streets * * * and the right of way through the same for the purposes of the railway or railways as herein authorized and provided, shall be considered and are hereby declared to be a public use, consistent with the uses for which the streets * * * are publicly held."

It will be seen that in the very recital of the act itself, the Legislature authorizes the use of the streets for the purpose of constructing the roadway, and clinches the matter by expressly providing that such use shall be considered "a public use" consistent with the uses for which the streets are publicly held. The promoters of this scheme displayed great wisdom in securing in advance the legislative sanction for their enterprise. For a time the subordinate tribunals of the State upheld the law, but the Court of Appeals, in a case of monumental importance, planted itself upon firm constitutional ground, and held that the invasion of the street for elevated railway purposes was an encroachment upon the easement of the abutting owners in the street in light, air, and access, and that injunctive relief might properly be granted, unless the abutters' rights have been properly acquired and due compensation made therefor. Probably no decision ever rendered by a State or a Federal Court has involved such immense pecuniary interests, and certainly none has ever been assailed with more vehemence and acerbity. Under various disguises ingenious counsel have returned to the attack, only to find that the court remains unshaken, and that the case of *Story v. New York Elev. Ry. Co.*, 90 N. Y. 122, and the pendant case of *Lahr v. Metropolitan Elev. Ry. Co.*, 104 N. Y. 268, form a "pillared law" that corporate greed dare scarcely menace and certainly never affect.

In the *Story Case*, *supra*, three principal questions were considered: 1, Whether the appropriation of Front street for the use of the elevated railroad was consistent with the use of the street as an open public street; 2, Whether *Story*, an abutting owner on the street, the fee of which

was (as was assumed) in the city, had any property rights in the nature of easements of light, air and access in and from the street, for the benefit of his adjacent property, which were invaded by the construction of the road; 3, Whether such rights, if they existed, were properly within the constitutional provision prohibiting the taking of private property for public use without due compensation. The decision of the court on the first point, while recognizing the rule that the Legislature may authorize the construction and operation of an ordinary surface railroad in a city street, placed its decision against the defendant on the character of the structure, and held that it was destructive of the street uses for which streets are established. Upon the second point, it was held that the plaintiff had easements in the street, of light, air and access, appurtenant to his lot, which were affected by the structure of the defendant, impairing the value of his lot. The court, in tracing the origin of his property rights in the nature of easements in the street, placed much stress upon two facts, viz: the original grant from the city, then the owner both of the land granted and of that which subsequently became known and styled as Front street; and, second, the express covenant of the city, contained in the grant, that the streets referred to therein should forever thereafter continue to be public streets. It was decided, in respect to the third point, that incorporeal rights annexed to property were properly within the protection of the Constitution, and could not be taken or impaired without compensation.

In the *Lahr Case*, 104 N. Y. 268; the street upon which the plaintiff's lot was situated had been opened under the statute of 1813. The decision in the *Story case* left open but one point for discussion, viz: whether lot owners upon streets opened under that statute had similar easements of light, air and access as those which *Story* had, although the plaintiff, and those under whom he claimed, did not derive their title from the city, and had not express covenants such as existed in the case of *Story*. The court decided that the plaintiff, notwithstanding this difference in the circumstances in the two cases, had easements of the same character as *Story*. The court regarded the statute of

1813, which permitted the taking by the city of lands for streets and the assessing of the cost of improvement upon the property benefited, taken in connection with the trust declared therein, as equivalent to a contract or covenant by the city with the adjacent lot owners that the streets opened under the statute should forever remain open and public streets, and the consequence was held to follow that they could not be appropriated to other than street uses, to the injury of abutting owners, except upon the condition of making compensation.

The majority of the court did not limit the recovery to damages caused by operating the road on that part of the street immediately in front of the premises. They held that the road and its intended use could not be dissected and separated, but must be considered in its entirety in considering its effect upon the property of the abutter; that however the damages may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass, rendering the wrongdoer liable for the consequences of his acts. And while they predicated the right of the abutter to recover upon the proposition that he had an easement in the street to its full width for ingress and egress to and from his premises, and also for the free passage and circulation of light and air through and over such street, for the benefit of property situated thereon, yet they did not limit the recovery to damages resulting from interference with access, light and air, but extended it to any damages resulting from the unlawful maintenance and operation of the road in the street.¹⁷⁵

In *Story's Case*, importance was given to the language of a covenant contained in the grants dividing and conveying the lots forming a larger tract owned and granted by the city of which *Story's* lot was a part, and to chapter 86 of the Revised Laws of 1813, under which the street was laid out. But the judgment in *Lahr's Case* was not placed on the ground that any rights in or to the bed of the street had been granted, or reserved to him, or to any of his predecessors,

¹⁷⁵ See also *Story v. New York Elevated R. R. Co.* 90 N. Y. 122; *Fobes v. Rome, W. & O. R. R. Co.* 121 Id. 505; *Adams v. Chicago, B. & Q. N. R. Co.* 39 Minn. 286.

and it was held, some force being given to the Act of 1813, that he had rights of property in the street.

The learned judges who delivered dissenting opinions in Story's Case did not deny, but rather assumed, that the abutting owners had rights of property in the street, and held that those of the public were paramount; that the rights of both arose and existed by virtue of the same authority, and that those of the abutting owners could, by legislative and municipal action, be further subordinated to the rights of the public, for the purpose of affording additional and necessary facilities for the transportation of persons and property through the street. Since Story's Case was decided, questions akin to the one under consideration have been discussed by the Court of Appeals.

In Mahady's Case, 91 N. Y. 153, Andrews, J., delivering the opinion of the court said: "The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street, and neither the Legislature nor the city could devote it to purposes inconsistent with street uses without compensation, according to the principle of *Story v. New York Elev. R. Co.*, 90 N. Y. 122."

Again the same learned judge, in delivering the opinion in *Pond's Case*, 112 N. Y. 188, said: "The *Story Case*, established the principle that an abutting owner on streets in the city of New York possesses, as incident to such ownership, easements of light, air and access in and from the adjacent streets, for the benefit of his abutting lands, and that appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation."

In *Powers v. Manhattan R. Co.*, 120 N. Y. 178, Brown, J., in his opinion, said: "The facts of the *Story Case* were not broad enough to necessarily cover the case of an abutting owner whose only property in the street was an easement for light, air and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. Metropolitan Elev. R. Co.*" The cases last cited did not, perhaps, involve the question discussed in the remarks quoted; but it cannot be assumed that they were made without deliberation, for since *Story's Case*, this pre-

cise question has been much debated and hardly out of the hands of the judges of the court of last resort.¹⁷⁶

In the Story Case the road was to be constructed upon a series of columns set in the outer edge of the sidewalk, on each side carrying great girders for the support of cross ties for three sets of rails, fifteen feet above the street. The structure divided the street into a sort of basement, used by the general public and abutting owners, and a first floor used exclusively by the railroad company. The court compared the structure to the illegal erection in the street of the house in the case in 6 Johns. Ch. 439; 2 L. ed. 178, *Corning v. Lowerre*, and of the freight depot in 94 U. S. 324; 24 L. ed. 224, *Barney v. Keokuk*. In the Lahr Case the elevated road was similar. It is not, in these cases, claimed that the generating of gas, steam, and smoke, and the distribution of cinders, dust, and ashes by a street railway is necessarily an additional servitude on the street, except as it is aggravated by the height from which it is thus distributed and thrown down upon the street. A street railway is not an additional servitude, though operated by steam;¹⁷⁷ while an ordinary commercial railway is, though run by horse power.¹⁷⁸ Yet the former will deprive the abutting owner of much more light and air than the latter. It is lawful to move a house on the street,¹⁷⁹ though it deprives the owner of much more light and air than any railroad train. Unless prohibited by some statute or ordinance, it is held that it is not unlawful to run a traction steam engine on a public highway.¹⁸⁰ What is an additional servitude does not at all depend on the amount of space it necessarily occupies, or the amount of light and air it necessarily excludes, in passing along the street. The street belongs to the local public. In a city that would include perhaps all the adjacent country tributary to the city by the ordinary highways, and if the railroad is "in aid of the street," does not destroy its ordinary and useful uses, and

¹⁷⁶ Case of *Gustafson v. Hamm*, L. R. A. 22, opinion by Canty, J.

¹⁷⁷ *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303.

¹⁷⁸ *Carli v. Stillwater Street R. &*

Transfer Co. 28 Minn. 373, 41 Am. Rep. 290.

¹⁷⁹ *Graves v. Shattuck*, 35 N. H. 262, 69 Am. Dec. 536.

¹⁸⁰ *Macomber v. Nichols*, 34 Mich. 312, 22 Am. Rep. 522.

does not collect and converge on one street the traffic from any other or greater territory. It is not an additional servitude, no matter how much light and air it necessarily excludes by its moving appliances.

As the owner of a lot abutting on a street has, as appurtenant to the lot, and independently of the ownership of the fee of street, an easement in the street, to its full width in front of his lot, for purposes of access, light and air, which constitutes property, therefore the maintenance and operation of a railroad on any part of the street in front of his lot so as to pollute the air and thus depreciate the rental value of the premises, constitutes a positive invasion of property rights, for which the owner may maintain a private action; and where his legal right is clear, and the nuisance or trespass a continuing one, he may maintain an action to enjoin it.¹⁸¹

The fee of the streets in New York city is held in trust by the city, however they may be acquired. "These rights arise from the course of legislation, the trust created by the statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street and shall not be diverted to other and inconsistent uses. There is some analogy between the rights of abutting owners as against the public, and those acquired by the public against private persons in streets or highways by dedication. The public acquires, upon acceptance of a dedication by the owner of land of a highway over the same, a *perpetual easement* therein for a highway, although there may be no deed, or writing, or covenant, and no formalities attending the transaction, such as is required for the creation of an easement at common law. The State has dedicated the streets in the city of New York to be public streets. The abutting owners have acted upon the dedication and upon the pledge of the public faith that they shall continue to be open public streets forever. It would be gross injustice to deprive them of the advantages intended, without compensa-

¹⁸¹ *Gustafson v. Hamm*, L. R. A. opinion of Finch, J., in *Drucker's* 22, opinion by Canty, J.; see also case, 106 N. Y. 158.

tion. A dedication ought to be, and is, we think, irrevocable.''¹⁸²

In the course of a very elaborate opinion by Ruger, C. J., in *Galway v. Metropolitan E. Ry. Co.*, 128 N. Y. 132, it is said: "It is not claimed here that the plaintiff has ceased to be the owner of the easements impaired, or that any other party has acquired title thereto, but it is argued that he has lost the right to employ the equitable power of the courts by reason of his neglect to demand it within ten years from the time when a cause of action accrued. Thus, although the wrongful acts may be continued and the owner subjected to irreparable injury, and his legal remedy may be either inadequate or require that it should be sought through repeated and numerous actions at law, it is contended that the jurisdiction of an equity court shall be arrested at the very time when, in the interest of the public, the exercise of its power becomes the most apparent and necessary. This claim, we think, is altogether untenable. The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, or have his property taken for public use without just compensation; and it necessarily follows that so long as such person continues to be the owner of property and liable to be injured in respect thereto by the unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation applicable to his legal right or before adverse possession has barred his title to the property injured."¹⁸³ The cause of action both at law and equity, in such cases, arises out of the trespasses committed, and is based on the ownership of the property upon which the injuries are inflicted, and it is obvious that no cause of action can be barred while there is an outstanding legal cause of

¹⁸² Per Andrews, J., in *Kane v. New York Elevated R. R. Co.* 125 N. Y. 164, 185.

¹⁸³ *Uline v. N. Y. C. & H. R. R.*

R. 101 N. Y. 98; *Arnold v. H. R. R. Co.* 55 id. 661; *Colrick v. Swinburne*, 105 N. Y. 503; *Tallman v. M. E. R. R. Co.* 121 id. 123.

action for which the party has a legal remedy, The existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but it is also the foundation of the jurisdiction which equity courts possess in respect to the subject matter."

These cases have been followed by subsequent decisions of other States, and their doctrine has been approved by the most prominent writers upon the subject. The opinions are very elaborate, and we cannot do better than adopt Judge Dillon's summary of some of the principles enunciated: "These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public—that is, to the paramount rights of the public for street uses proper—or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper; subject, of course, to legislative and municipal regulations; and that such rights are property or property rights in the abutter, which can only be taken away by the Legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. * * * If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, those rights are in the nature of equitable easements in fee—the soil of the street being the servient, the abutting owner's lot being the dominant tenement. Among the most important of such rights or easements is the abutter's right to access, to light and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements while the Legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz: on condition of making compensation to the abutting owner for the damage which his property actually sustained." "The result of the author's reflections upon this subject is that the views of the Court of Appeals are sound and just—sound, because they recognize the paramount nature of the public right to put the street to this new and necessary form

of public use; just, because they recognize and declare that the abutter has special proprietary rights or easements in their nature which he is not called upon unequally to sacrifice without compensation for the public use. In effect, the court says the just and true doctrine is, "Take but pay."¹⁸⁴

The contrary view, laid down in Wood's Railway Law, vol. 2, p. 727, seems to be based upon the restricted interpretation of the word "taken;" it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character, and *damnum absque injuria*. The learned author admits that such would not be the case if the words used were "taken or damaged," but by a reference to the opinion in *Staton v. Norfolk & C. R. Co.*, 11 N. C. 278; 17 L. R. A. 838, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision.¹⁸⁵

Servitudes — Steam Railways. The great weight of decisions sustain the proposition that a railroad constructed in a street or highway and operated by steam in the usual manner imposes a new servitude and entitles the owner of the fee to an additional compensation, but that a street railway operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude and does not call for additional compensation.¹⁸⁶ A steam railroad is held to impose a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street in the other usual mode, or in other words, so as practically to exclude the usual modes of

¹⁸⁴ 1 Hare, Am. Const. L. 370, 375; Lewis, Em. Dom. secs. 114, 115; Booth, Street Railway Law, sec. 81; Barney v. Keokuk, *supra*; St. Paul & P. R. Co. v. Schurmeier, 74 U. S. (7 Wall.), 272, 19 L. ed. 74; 1 Rorer, Railroad, 524; Story v. New York Elev. R. Co. *supra*; Haynes v. Thomas, 7 Ind. 38; South Carolina R. Co. v. Steiner, 44 Ga. 546; Theo-

bold v. Louisville, N. O. & T. R. Co. *supra*.

¹⁸⁵ Lewis, Em. Dom. 58; Pumpselly v. Green Bay & M. Canal Co. 80 U. S. (13 Wall.), 166, 20 L. ed. 557; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 177.

¹⁸⁶ Mills, Em. Dom. sec. 205, and cases cited; Angell on High. sec. 91.

use.¹⁸⁷ It comes into serious conflict with the usual modes of travel, and is a perpetual embarrassment to them in greater or less degree according as the business of the railroad is greater or less, or as the running of the trains is more or less frequent; whereas the ordinary street railway instead of adding new servitude to the street, operates in furtherance of its original uses, and instead of being an embarrassment, relieves the pressure of local business and local travel.¹⁸⁸ By reasoning from analogy the courts very generally hold that the use of electricity as a motive power, does not impose any new servitude upon the street which requires the making of any additional compensation.¹⁸⁹

§ 198. Of lateral and subjacent support. *a. Preliminary.* This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land and the minerals belonging to different owners, the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but, if the surface subsides and is injured by the removal of these strata, although on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence.

By the common law, every owner of land is his own judge

¹⁸⁷ Pierce, Railroads, 234.

¹⁸⁸ Citizens' Coach Co. v. Camden Horse R. Co. 33 N. J. Eq. 267; Elliott v. Fair Haven & W. R. R. Co.

32 Conn. 579; Hobart v. Milwaukee City R. Co. 27 Wis. 194.

¹⁸⁹ Taggart v. Newport St. Ry Co. 16 R. I. 668.

of the propriety of building upon it or leaving it vacant; and when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material he pleases, and he is under no obligation to give to his neighbor any use or advantage of his land, by way of support, drip, or easement of any description. If a stranger dispossess him, or enter upon his unoccupied property, erect buildings, and make valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any portion of the expense, on recovering the possession of the land.

The law exacts from a person doing even a lawful act, which may produce an injury to his neighbor, the exercise of a degree of care measured by the danger to prevent or mitigate the injury.¹⁹⁰ Leake says if one, by carelessness in excavating on his land, causes injury to an adjoining building, even where the owner of the house has no easement of support, he is liable.¹⁹¹

b. *Views of eminent writers.* In 2 Shearman & Redfield on Negligence, 4th ed., sec. 701, it is stated: "In exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while, as a general rule, he is not bound to continue the support which his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is, therefore, not liable for the natural consequences of his withdrawing his support, yet in doing so he must act with such care and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land. One who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so, and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land;" and in the next preceding section the rule is laid down that "it is not, therefore, neces-

¹⁹⁰ Booth v. R. W. & O. R. R. Co.,
140 N. Y. 267.

¹⁹¹ Leake's Law Real Prop., 267.

sarily negligence on the part of a land owner to make a use of his land which inevitably produces loss to his neighbor; for, as he may wilfully adopt such a course, and yet not be a wrongdoer, much less is he liable for unintentionally doing that which he has a right to do intentionally." In another approved writer on Negligence it is stated: "But, whatever may be the right of one landowner to excavate his own soil so as to deprive his neighbor's land of its support, the authorities are agreed that he must exercise what care and skill he can to prevent injury to his neighbor; and if he inflict an unnecessary injury upon his neighbor through negligence, he must pay the damages. Thus, the authorities are agreed that one who proposes to excavate or make other alteration or improvement upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. But, after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work. Where the excavation was of itself lawful, and the gravamen of the plaintiff's complaint was that it was unskilfully done, it was held incumbent on the plaintiff to show negligence by other proof than by the mere fact that the walls of his house cracked and gave away. In the view of the court so deciding this was not a case for the application of the rule *res ipsa loquitur*. If the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he removes his own with reasonable and ordinary care."¹⁹²

The Court of Appeals of Kentucky says: "The proprietor making the excavation cannot be charged with damages for negligence because he failed to shore up his neighbor's house in a case where the latter has no right of support in the nature of an easement by grant or prescription. In such case his neighbor must shore up his own house."¹⁹³ And there is

¹⁹² 1 Thomp. Neg. 276, 278.

¹⁹³ Shrieve v. Stokes, 8 B. Mon. 453; 48 Am. Dec. 401.

no obligation on the part of the owner of a building about to be removed to shore up the other building.¹⁹⁴ In *Shafer v. Wilson*, 44 Md. 268, the same doctrine is distinctly recognized — that, proper notice being given to the owner of a building on an adjacent lot, it is the duty of the latter, on receiving such notice, to shore up his own building. In *Lasala v. Holbrook*, 4 Paige, 169; 3 L. ed. 390, the same principle finds recognition. To the same effect see *Peyton v. London*, 9 Barn. & C. 725, and other English cases, and 2 Shearm. & Redf. *supra*, sec. 701. And the duty of the owner of a building on an adjacent lot which may probably be imperilled by the digging for a foundation on his neighbor's lot, to protect his building, is stated to begin after he has been notified of the intended improvement, and given an opportunity to protect his own interests. But if he has personal knowledge of the progress of the intended improvement, this is tantamount to notice. This is the doctrine also of the court in *Charless v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642.

Very much has been written upon the right of lateral support and its limitations under the English law. It will not be necessary to restate the general principles governing that right. They were discussed very lucidly years ago in *Charless v. Rankin*, 22 Mo. 573; 66 Am. Dec. 642, which remains a leading case on the subject. For present purposes it will suffice to say it is settled law that the unquestionable right of a land owner to remove the earth from his own premises, adjacent to another's building, is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing. We need not inquire how such a principle became ingrafted upon a system which traces its origin to the English common law; but that it is there is evidenced by abundant decisions, of which a few leaders, besides that above cited, may be mentioned.¹⁹⁵ The underlying principle of legal ethics on which this rule rests is well stated in *Charless v. Rankin*, *supra*, to be that "if a man in the exercise of his own rights of property, do damage

¹⁹⁴ Goddard, Easem. (Bennett's Hudson River R. Co., 25 N. Y. 334; ed.), pp. 43, 44. Quincy v. Jones, 76 Ill. 240; 29

¹⁹⁵ Foley v. Wyeth, 2 Allen (Mass.), Am. Rep. 243.
131; 79 Am. Dec. 771; Austin v.

to his neighbor, he is liable if it might have been avoided by the use of reasonable care." The reports furnish many illustrations of its application, but we need not stop to emphasize the statement of it by references to them, since its force, in cases of this character, is now fully recognized. What is the standard of ordinary care which one excavating on his own estate must use to avoid damage to his neighbor's building, is a question of some difficulty. In many localities the subject is regulated by statutes, defining the reciprocal rights of the parties. It may be stated generally, in the absence of the statutory rule, that the care required of a party so excavating is that a man of ordinary prudence in the circumstances of the particular situation; but that statement affords meager aid in determining the exact duty imposed by the rule in its practical application to any given case. The fact is that the particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede, rather than to promote, the administration of justice. Quite recently it has been definitely held, following supposed indications in earlier cases, that prior notice to the neighbor whose property may be endangered by an excavation is an essential part of the ordinary care referred to,¹⁹⁶ but that ruling was accompanied by a vigorous dissent, and can scarcely be considered as settling the point.

c. *Quotations from recent cases.* In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence. But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor

¹⁹⁶ *Schultz v. Byers*, 53 N. J. L. 442; 13 L. R. A. 569.

for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundation so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right.¹⁹⁷

"It has generally been considered that for an excavation causing an injury to the soil in its natural state an action would lie; but that, without proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to buildings by excavating adjoining land not previously built upon."¹⁹⁸

"It is difficult to see how the owner of a house can acquire, by prescription, a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former."¹⁹⁹

d. *Comments on this theory.* A similar view was taken of this matter in the case of *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 421. That case was decided not alone upon the authority of the Ohio cases, but upon that of other leading, well considered cases, particularly that of *Gilmore v. Driscoll*, 122 Mass. 199. The same court had previously held in *Cincinnati v. Penny*, 21 Ohio St. 499; 8 Am. Rep. 73, that the corporation was not liable for damages to buildings caused by negligence in making the excavation, where their weight contributed to the injury. See, also, the very recent case of *Stearns v. Richmond*, 88 Va. 992. In that case the right to recover was

¹⁹⁷ *Gilmore v. Driscoll*, 122 Mass 199.

¹⁹⁸ *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169; *Hay v. Cohoes Co.*, 2 Const. 159, 162; *McGuire v. Grant*, 1 Dutcher, 356; *Richart v. Scott*, 7

Watts, 460; *Richardson v. Vermont Central Railroad*, 25 Vt. 465; *Beard v. Murphy*, 37 Vt. 99, 102; *Shrieve v. Stokes*, 8 B. Mon. 453; *Charless v. Rankin*, 22 Mo. 566.

¹⁹⁹ *Gilmore v. Driscoll*, 122 Mass. 199.

extended to buildings. The court used this language: "Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. * * * In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and if the neighbor digs upon or improves his own land so as to injure this right, an action may be maintained against him without proof of negligence. And, although this natural right does not extend to buildings increasing the downward and lateral pressure, and, therefore, if damage is done to them by digging in the adjoining soil, no action can be maintained therefor, unless negligence be proved, yet it is settled by the recent decisions in England, and it would seem clear upon principle, that when land upon which there are buildings slides or subsides by reason of such digging, and the buildings are in consequence damaged also, and their weight in no way contributed to the result, then the damage done to the buildings may be taken into consideration in estimating the damages."²⁰⁰

There is no doubt that what are termed "consequential" injuries are by most of the courts held to be remediless, although nearly all of the courts in this country have at one time or another regretted the existence of such a rule, and that they could not under the law follow the decisions of the Supreme Court of Ohio, which are to the contrary. Yet we find a number of the States granting relief in cases of the particular character of the one at bar; and although they are sometimes loosely denominated "consequential injuries," the fact is that they are not consequential, but direct, injuries.

In Massachusetts the doctrine of non liability for such injuries as those under discussion is fully established. The first case upon the subject was that of *Callender v. Marsh*. This was an action for damages for lowering the grade of the street, by reason of which the lateral support was taken away from plaintiff's lot, and the soil thereof caused to fall or slide into the excavation. In a most exhaustive opinion, in which the question is discussed upon principle and in the light of

²⁰⁰*Brown v. Robbins*, 4 Hurlst. & Hurlst. & N. 454; *Lewis, Emm. Do.*
N. 186; *Stroyan v. Knowles*, 6 sec. 100, 151,

the authorities both in England and America, the court holds that the action would not lie. The broad doctrine is announced that, so long as the authorities are proceeding properly in the amending of a grade of a street, they are not liable for consequential damages, and that damages of the nature set out in the complaint in that action were consequential, and therefore not actionable. The argument of the opinion seems unanswerable, and shows clearly that any other rule than that thus laid down would be destructive of the rights of the public, as enjoyed from the remotest time. The opinion further shows that, though there may be instances where the rule will work hardship, yet that such will not be the fact, as a general proposition. It holds that, as a general rule, those who purchase lots bordering upon streets, calculate the chance of such elevations and reductions as may be required to prepare such street for use, and to maintain the same in such a condition as the public exigencies may require, and that the price which may be paid for such lot is usually influenced by such considerations, and hence no injustice is done in refusing to allow compensation for acts which must be held to have been fairly contemplated at the time of such purchase. It is true that in this case a part of the claim for damages was for injuries to a building situate upon the lot, but that fact does not seem to have had any influence upon the opinion of the court, as its decision is general, that for removal of lateral support plaintiff has no remedy. The rule established by this case has continued to be the rule of decisions in said State.

The right of an owner of land to the lateral support of the adjacent land is "*jure naturæ*," like the right in a flowing stream. If the abutter excavates upon his own land in such a manner and to such an extent as to cause damage appreciable, he must respond in damages to the party injured and it is not necessary that in such an action the plaintiff should either allege or prove negligence on the part of the abutter. But this right of action must be for such damages as the land itself has sustained and shall not include the injury to buildings that may be erected upon the land, or ornamental shrubbery or vines. Countless cases have proceeded to trial that have sought to warp or modify this early rule, and

the English courts have evinced a mild disposition to reform the rule, but the American courts are tenaciously holding to a principle that must be regarded as too deeply imbedded in the law of real property to be disturbed at this late day — a principle that allows a landowner to recover for the damages to his realty caused by the excavation on his adjoining land or lot, but denies to him any right to recover for damages to the buildings thereon. This rule presupposes that there is no right by grant or prescription in the landowner so damaged and no actual negligence in the parties making the excavation.²⁰¹

It is among the mysteries of legal conception how the owner of a house, situate near the end or side line, can acquire "by prescription" a right to have it supported by the adjoining land. The English cases which apparently give him this right, proceed upon the principle that obtains in the doctrine of ancient lights — a doctrine which has been wholly repudiated in this country. The rule in digest form that is recognized in the United States is this: The owner has an indefeasible right to have his soil remain in its natural condition and any interference with this right, constitutes an injury, which the committing party must compensate, without reference to the question of negligence.

This entire subject received exhaustive ventilation in a recent Massachusetts case²⁰² in which Grey, Ch. J. — since translated to the Supreme Court of the United States — wrote for affirmance: It would be presumptuous to dissent from a conclusion reached by so eminent an authority, but the present writer is inclined to doubt the equity of this rule in cases where adjoining land has previously been built upon (and in the congested districts of most of our cities this is the actual fact), and the owner wishes to erect a more imposing structure, requiring for this purpose a deeper foundation; this calls for a complete undermining of the adjacent lot which very likely has a building upon it. Can he, pro-

²⁰¹ *Lasala v. Holbrook*, 4 Paige, 460; *Hay v. Cohoes Co.*, 2 Comst. 169; *Beard v. Murphy*, 37 Vt. 99; 159; *Charles v. Rankin*, 22 Mo. 566.
²⁰² *Shrieve v. Stokes*, 8 N. B. Mon. 453; *McGuire v. Grant*, 1 Dutcher, 356; *Richard v. Scott*, 7 Watts. 199. *Gilmore v. Driscoll*, 122 Mass.

ceeding with ordinary care even, utterly demolish that building and respond in damages to the extent of the land value alone?" "There are others" on earth besides our next door neighbors, and if in my own pursuit of self I overturn my neighbor's six-story building it can be but little assuagement for his loss to be told that I exercised due care in making the excavations.

An early case that is still cited by our courts with varying sentiments of approval is that of *Thurston v. Hancock*, 12 Mass. 220. Ch. J. Parker, formulates the rule with great minuteness which was followed in the later case of *Foley v. Weith*, 84 Mass. 131, decided in 1861, in an opinion by Hon, Pliny Merrick. Before concluding it would be well to refer to the English cases that discuss the subject as the question is certainly an open one and entitled to very serious consideration.²⁰³

e. *Lansala v. Holbrook* reviewed. In 1833, Chancellor Walworth, in dealing with a case not involving this question, made this statement, viz: "From the recent English decisions it appears that the party who is about to endanger the buildings of a neighbor by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement."²⁰⁴ To support this statement he cites *Peyton v. London*, 9 Barn. & C. 725; *Walters v. Pfcil*, 1 Mood. & M. 362; and *Massey v. Goyder*, 4 Car. & P. 161. All these cases were cited in 1829. I think it can be shown that this statement of Chancellor Walworth is the sole basis of the claim that the doctrine contended for is established by authority. The independent opinion of that eminent jurist, would go far to establish the doctrine but, as has been seen, no opinion was called for, and none was expressed by him. Moreover, the cases referred to do not support his statement. In *Peyton v. London*, Lord Tenterden, after adverting to the fact that the declaration did not charge a want of notice of taking down the house whereby the alleged injury was caused, added: "Therefore, in our opin-

²⁰³ See *Humphries v. Brogden*, 12 A. & L. N. S. 739; *Tennant v. Goldwin*, 2 Ld. Raym. 1089; *Gale & Whately on Easements*, 215.

²⁰⁴ *Lansala v. Holbrook*, 4 Paige, 169; 3 L. ed. 390.

ion, the action cannot be maintained upon the want of such notice, supposing that, as matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called upon to give any opinion."

In *Walters v. Pfeil*, the question of the obligation to give notice was not raised or mentioned. *Massey v. Goyder* is the report of a trial before Chief Justice Tindal. By one count, defendant was charged with excavating on his own land to the injury of plaintiff's building, without giving previous notice; by another count he was charged with negligently excavating. The question of notice was left to the jury, who found notice had been given, but upon a general finding, judgment was entered on the last count. It is plain that none of the cases justified a verdict on the last count. It is plain that none of the cases justified the statement in *Lasala v. Holbrook*. The precise question was afterwards raised. One of the counts of a declaration for injury done to a building by removal of its support on adjacent land was founded on a lack of notice. Tindal, Ch. J., in dealing with the case on demurrer, said: "As to the allegation that it was the duty of defendant to give notice to plaintiff of his intention to pull down his wall, * * * it is objected, and we think with considerable weight, that no such obligation results as an inference of law from the mere circumstance of the juxtaposition of the walls of defendant and plaintiff."²⁰⁵ That cause was thereafter tried before the same chief justice. One of the issues was on the above mentioned count. Damages were awarded generally. On writ of error, the Exchequer Chamber reversed the judgment. Baron Parke, delivering the unanimous judgment of the court, quoted the language of Chief Justice Tindal, above set out, and added: "We also think it impossible to say that, under such circumstances, the law imposes upon a party any duty to give his neighbor notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantial ground for damage; and the probability is that the main damage did result from the want of notice, for it is obvious that if notice had been given, the plaintiff might

²⁰⁵ *Trower v. Chadwick*, 3 Bing. N. C. 334.

have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think that the judgment must be arrested, and a *venire de novo* awarded."²⁰⁶ Notwithstanding this unmistakable deliverance, the statement of Chancellor Walworth commenced and has continued to be cited as expressing the conclusions of English courts on this subject. In the edition of the third volume of Kent's Commentaries, which was published in 1840, it is stated that "if the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives due notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he remove his own with reasonable and ordinary care."

This statement was not made in the first edition of that volume, which was published in 1828. From that fact, and from the note to the passage above quoted, it is plain that it was based upon *Lasala v. Holbrook* and the English cases of 1829. The case of *Chadwick v. Trower* was not alluded to. After the decision of *Trower v. Chadwick*, Gale & Whately, in their treatise on Easements, discussed the question of the duty to give notice, now contended for, and declared their opinion that, if the observations of Chief Justice Tindal in that case were well founded, no such duty was imposed by law. Those observations were adopted and approved by the Exchequer Chamber. Subsequent authors in this country have expressed views in respect to the duty to give notice, but they refer for English authority only to the cases of 1829, on which the statement in *Lasala v. Holbrook* had been based. The case of *Chadwick v. Trower* is not mentioned. They also refer to American cases as authority for the doctrine. I have not been able to find among them a single case justifying the statement. The cases generally cited are *Shrieve v. Stokes*, 8 B. Mon. 453; *Winn v. Abeles*, 35 Kan. 85, and *Shafer v. Wilson*, 44 Md. 268. In *Shrieve v. Stokes*, the question of the obligation to give notice was not raised by the pleadings or the evidence. What was said by

²⁰⁶ *Chadwick v. Trower*, 6 Bing. N. C. 1 (1839).

the court on the subject was incidental, and based on supposed authority of the English cases of 1829. In *Winn v. Abeles*, the question of duty to give notice was not involved. In *Shafer v. Wilson*, the question of liability for want of notice was raised. The court below instructed the jury that notice was a duty. In reviewing this instruction, the court above only says that such notice would seem to be a reasonable precaution, and bases this statement on *Lasala v. Holbrook*.

This review justifies the assertion that the doctrine contended for has not the sanction of authority. In the only adjudicated case not based on mistaken citations the determination was against the doctrine.

It is well settled that the owner of land adjacent to another cannot remove the earth upon his own land so as to withdraw the support of his neighbor's soil. If he attempts to do so he may be enjoined, or if done, he is responsible for damages. This right is *ex jure naturæ*, but it applies only to land in its natural state. By both the ancient and present common law A. cannot dig a pit upon his land so near the edge of it that B.'s land will tumble into it; but this rule does not apply where B. has burdened his land with artificial weight, as by a building. It is strictly confined to cases where he has not thus increased the lateral pressure. The adjoining owner cannot, by changing the natural condition of his land, take away his neighbor's right to the use he could have made of it, in the absence of such change. He cannot load down his own soil so as to require the support of his neighbor's. In such a case the owner of the improved land can only hold the adjoining owner liable for a negligent use of his property, or when there is a failure to apprise him of the intended use, and it is reasonably certain injury will result to him by reason of it.

One who employs a contractor to excavate for a building is not relieved of liability for the fall of a building on adjacent premises caused by digging a trench too long and deep alongside the wall by the fact that the work was done by a contractor where the contract stipulated that the employer's engineer should be in charge of the work, with power to order the discharge of men who refused to obey his orders and where by an authorized assistant he did in fact order the

trench to be dug as it was dug, and it follows that a proprietor who makes excavation in his own land, near the premises of his neighbor, in a careless and negligent manner, is liable in damages for injuries to the building of the adjoining owner, which were the consequence of his carelessness and negligence in the work of excavation.²⁰⁷

Although work has been let to a contractor, this fact will not exonerate a party for whom the work is performed from liability for the negligent acts of the contractor, or his servants, if the right to control or direct the mode or manner of the work in any respect is retained, or if such control be in fact exercised, or such direction assumed.²⁰⁸

I conclude this summary with a citation from Mr. Beach. "In cases where the party is entitled to lateral support, and, by removing soil interfering with a party wall or otherwise endangering that right, such damage is threatened as may in its nature be irreparable, injunction will properly lie to restrain such acts."²⁰⁹ On the other hand, an attempt to make use of a party wall, when the same has by reason of fire or other cause become unsafe, may be enjoined.²¹⁰ In a proper case equity will restrain by injunction encroachments in the nature of excavations, and interference with walls, etc., by an adjacent owner in building operations.²¹¹ But a land

²⁰⁷ *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Stevenson v. Wallace*, 27 Gratt. 89; *Moody v. McClelland*, 39 Ala. 52, 84 Am. Dec. 770; *Myer v. Hobbs*, 57 Ala. 177, 27 Am. Rep. 719; *Shafer v. Wilson*, 44 Md. 269; *Austin v. Hudson River R. Co.* 25 N. Y. 334; *Quincy v. Jones*, 76 Ill. 231, 29 Am. Rep. 243; *McMillan v. Staples*, 36 Iowa, 532; *Dodd v. Holme*, 1 Ad. & El. 493; *Foley v. Wyeth*, 2 Allen (Mass.), 131, 79 Am. Dec. 771; *Washb. Easem.* 4th ed. top p. 582 *et seq.*, *430 *et seq.*; *Thomp. Neg.* 276; *Cooley, Torts*, 2d ed. top. p. 707, *595; *Wood, Nuisances*, 2d ed. secs. 189, 190.

²⁰⁸ *Speed v. Atlantic & P. R. Co.*

71 Mo. 303; *New Orleans M. & C. R. Co. v. Hanning*, 82 U. S.; 15 Wall. 657; 21 L. ed. 223; *Heffernan v. Benkard*, 1 Robt. 432; *Schwartz v. Gilmore*, 45 Ill. 457, 92 Am. Dec. 227; *Faren v. Sellers*, 39 La. Ann. 1011; *Brophy v. Bartlett*, 10 Cent. Rep. 709; 108 N. Y. 632; *Jones v. Chantry*, 4 *Thomp. & C.* 61; *Whart. Neg. sec.* 181.

²⁰⁹ *Phillips v. Boardman*, 86 Mass. 147; *Trowbridge v. True*, 52 Conn. 190; *Morrison v. King*, 62 Ill. 30.

²¹⁰ *Hoffman v. Kuhn*, 57 Miss. 749.

²¹¹ *Tribune Asso. v. Sun*, 7 Hun, 175; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *Chicago, B. & Q. R. Co. v. Porter*, 72 Iowa, 426.

owner will not be enjoined from making excavations on his land where no serious injury to the adjoining realty is imminent, and where there is nothing peculiar in the situation and circumstances of such realty."²¹²

§ 199. **Party walls and division fences.** — a. *Definition and nature.* A party wall is a partition wall, separating different buildings and in the absence of express stipulations to the contrary, either party may use it.²¹³ The presumption is that a partition wall between different owners or between different buildings under the same ownership, is a party wall.²¹⁴ Contracts in relation to party walls create an easement running with the land, and are binding upon all subsequent grantees.²¹⁵ An agreement by one owner that he will contribute towards the expense of a party wall, to be erected by the adjoining owner, said expense to be paid "when the first owner shall build," is not a covenant running with the land.²¹⁶ As to covenants that run with the land and those that are merely personal see, *post*, ch. "Deeds."

Party Walls. A right to a party wall is such as the owner of land has to build a division wall partly over his land and on the land of the abutting owner. It has all of the characteristics of an easement or servitude. The rights and liabilities of the respective owners are differently construed by our various State courts. A formidable array of authority, however, may be cited in support of the proposition that under a valid agreement between the abutters, cross easements are created which run with the land and consequently bind all parties succeeding to the title.²¹⁷

An eminent author says: "By party walls are understood walls between two estates which are used for the common benefit of both."²¹⁸

While this definition is sufficiently accurate and compre-

²¹² *McMaugh v. Burke*, 12 R. I. 499; *Morrison v. Latimer*, 51 Ga. 519; 2 Beach, Eq. Jur. 792.

²¹³ *Field v. Leiter*, 118 Ill. 17.

²¹⁴ *Wolfe v. Frost*, 4 Sandf. Ch. 72.

²¹⁵ *Masury v. Southworth*, 9 Ohio St. 340; *Roche v. Ullman*, 104 Ill. 11; *Columbia College v. Lynch*,

47 How. Pr. (N. Y.), 273; *Cating v. Korfhage*, 88 Mo. 524; *Gibson v. Holden*, 115 Ill. 199.

²¹⁶ *Cole v. Hughes*, 54 N. Y. 445.

²¹⁷ *Roberts v. Bye*, 30 Pa. St. 377.

²¹⁸ 2 Washb. Real Prop. 5th ed. 385.

hensive for ordinary purposes, it scarcely meets the requirements of many cases. Indeed it has been said "that the term 'party wall,' and the rights which the owner or grantee of its use acquires by mere force of the employment of that term in a grant or covenant, has never been judicially defined." But it was also said in the same case that a "party wall," when used in such an instrument, and in its general ordinary signification, means a dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by both parties; that is, by the respective owners of both houses."¹⁹

These utterances appear to have met the approval of the learned author already cited ²⁰

The central idea, the true, comprehensive and undivided meaning of the term "party wall," where used in any instrument would seem to be that of mutuality of benefit; and that idea is at war with any exclusive use of such wall by either proprietor. The effect of such contracts is to create in each owner of such wall reciprocal easements in the wall when built.²¹

In short, the idea of reciprocity pervades the whole contract, and effectually excludes the idea of any exclusive use of the wall. This view meets with support in the following cases:

In *Sullivan v. Graffort*, 35 Iowa, 531, an injunction was granted to prevent the defendant from making openings in a common or party wall built and paid for by him between the two houses, and it was adjudged that plaintiff was entitled to the use of the wall, could not subject it to any additional burden than that of using it as a wall in common; that any other use, to wit, making openings therein, subjected it to a servitude foreign to such use, and objects and purposes of the statute; and that such limitation of the use was equally assertive, whether before or after the wall became one in common, by payment by each party of his proportionate share of the cost of erection. The force and effect of this authority is not at all diminished by the fact that rulings made were based upon

¹⁹ *Fettretch v. Leamy*, 9 Bosw. 510.

²⁰ Washb. Easem. 3d ed. 567.

²¹ *Sharp v. Cheatham*, 5 West. Rep. 373; 88 Mo. 498, and cases cited.

statutory provisions, for those provisions are substantially identical with those of most contracts.

In the case of *Dauenhauer v. Devine*, 51 Tex. 480, a similar ruling was made. In that case the original agreement was for building a "party wall," Devine to build it, Dauenhauer to give half the ground on which the wall was to rest, and to pay half of the cost of the wall. Under this agreement, Devine built a two-story building, Dauenhauer having at that time a one-story building on his lot. Subsequently Dauenhauer began the erection of a three-story building on his lot, and, being about to raise the party wall for that purpose, was induced by Devine to sign an agreement that such wall should be a "dead wall." As the work went on, however, Dauenhauer, either mistaking or else ignoring the second contract, constructed the wall of the third story not as a dead wall, but one with divers openings in it; and upon this it was ruled that the second agreement, having no consideration to support it, was therefore void, but that the original agreement, being for "party wall or a dividing wall between their houses, obviously did not contemplate windows or doors." And so the injunction prayed for was made perpetual.²²²

The case of *Brooks v. Curtis*, 50 N. Y. 639, decides that one owner of a party wall has a right to build it up, and the same is held in *Everett v. Edwards*, 149 Mass. 588. In *Campbell v. Messier*, 4 Johns. Ch. 334, Chancellor Kent decided that one owner of a party wall who had rebuilt it could recover contribution of the other owner; so in *Field v. Leiter*, 117 Ill. 341, the wall was built by plaintiff one-half on adjoining land. This land the defendant bought and an agreement followed by which the defendant might use the wall as a party wall for his store, ten stories high, with the right to add to it, the defendant agreeing to strengthen the wall and foundation by necessary additions thereto on his own side. It was held that the defendant had a right to make necessary additions to the foundation on the plaintiff's side. The limitation upon the right of each owner to use a party wall as lateral support for such houses as he may choose to erect, is that he shall not impair the use of the structure to the other owner.

²²² Sherwood, J., in *Harber v. Evans*, 101 Mo. 661.

If one owner carries up the wall, the addition becomes part of the party wall, and the owners have equal rights in it and neither has a right to so use the wall as to weaken or impair its similar use by the other.²²³

“The fairer view and the one generally adopted in legislative provisions on the subject, in this and other countries, is to treat a party wall as a structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it which he may require, either by deepening the foundations or increasing the height, so far as it can be done without injury to the other.” The party making such change is obligated to observe care not to occasion injury to the adjoining owner, but the authorities generally seem to hold that in so far as he can use the party wall in the improvement of his own property, without injury to such wall or the adjoining property, there is no good reason why he may not be permitted to do so.²²⁴

A wall standing partly on the premises of each of adjoining owners, the portions of which are owned by them in severalty, with an easement for the support of the building of one of them, may be removed by the other for the purpose of erecting a new and better wall, although some inconvenience is thereby occasioned to the other owner; provided a new one is built within a reasonable time and with the least inconvenience to the other party and which shall furnish him the same right of support, and that he shall be indemnified for necessary expenses thereby occasioned him in consequence of the removal of the wall.²²⁵

In an action to recover the value of one-half of a party wall erected by the plaintiff, partly on his estate and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the

²²³ Phillips v. Boardman, 4 Allen (Mass.), 447.

²²⁴ Field v. Leiter, 118 Ill. 17.

²²⁵ Putzell v. Drovers & Mechanics' National Bank of Baltimore, L. R. A. 22.

plaintiff was so acting with that expectation, and allowed him so to act without objection.²²⁶

If the wall becomes dilapidated so that it is in obvious need of reconstruction, either party may, for his own safety, and the protection of others, remove the wall, and either party may underpin a wall or raise it higher for his own purpose, as long as it can be done without injury to the adjoining building. The cases on this subject will be found referred to in *Cooley on Torts*, and also collated in the case of *Brooks v. Curtis*, 50 N. Y. 639. But in those cases it does not become a mere question of care and diligence. There is an absolute duty imposed upon the proprietor who makes an alteration in the wall to see that his neighbor's property is not injured, and whether he exercises due care and skill or not, he is absolutely responsible for any injurious result that is traceable to the alteration.

Where a person purchases a vacant lot which supports half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a party wall agreement, entered into by his grantor, obliged to pay a part of the cost of said wall in the event of his using it, such agreement runs with the land and the wall will be deemed an incumbrance. A covenant against incumbrances includes both those known and unknown to the purchaser.²²⁷ In the case first cited the rule was inspired by the fact that there was an unpaid balance due the abutting owner before the wall could be made available by the owner of the vacant lot. The mere existence of the wall itself — had it been fully paid for — would have called for an entirely different conclusion. The Supreme Court of Iowa, in *Bertram v. Curtis*, 31 Iowa, 46, held that where the owner of a vacant lot on which rests one-half of a neighbor's wall, conveys the same with a covenant of warranty against incumbrances, the existence of such wall is not a breach of the covenant, and in *Hendricks v. Stark*, 37 N. Y. 106, it was held that a party wall creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal incumbrance.

²²⁶ *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347.

²²⁷ *Burr v. Lamaster*, 30 Neb. 688;

Huyck v. Andrews, 113 N. Y. 85; *Carter v. Denman*, 23 N. J. L. 273;

Mitchell v. Warner, 5 Conn. 527.

An addition to a party wall made by one of two adjoining owners, entirely on his own land, for the purpose of thickening and strengthening the wall so as to support a higher building, does not become a part of the party wall, and the abutting owner who uses the wall as strengthened in increasing the height of his building, is under no obligations to pay for the advantage so obtained.²²⁸

Where such a wall is erected one-half on the land of each adjoining proprietor, it does not render them tenants in common, but each is the owner in severalty of his part both of the wall and the land on which it stands. But the title of each is qualified by a cross easement in favor of the other which entitles him to support his building by means of the half of the wall belonging to his neighbor; in other words, each proprietor owns his own half in severalty, with an easement of support from the other half belonging to his neighbor.²²⁹ It is commonly held that each part owner may certainly increase the height of his half of the wall, or so much as stands on his own land, if he does not thereby endanger or injure the wall, he being responsible for any resulting damage occasioned by any change in the structure not required for repairs.²³⁰

There is much force in the holding that each proprietor may increase the height of the entire party wall if it can be done without injury to the rights of the remaining owner.²³¹ In the absence of any statutory regulation the question is largely determinable by the rules of the common law bearing on easements of this nature. Ordinarily a party wall will be construed to mean a solid wall without windows or openings. Such openings impair the stability of the structure; they increase the fire risk and affect the adjoining proprietor injuriously in many ways. If allowed to continue for twenty years the right to these window openings would mature into a perfect legal right under the doctrine of prescription.²³²

²²⁸ Walker v. Stetson, 162 Mass. 86; Allen v. Evans, 161 Id. 485.

²²⁹ Bloch v. Isham, 28 Ind. 37; 2 Washb. Real Prop. 386; Tied. Real Prop. sec. 620.

²³⁰ Andrae v. Haseltine, 58 Wis. 395.

²³¹ Brooks v. Curtis, 50 N. Y. 639.

²³² Ulbricht v. Eufaula Water Co. 86 Ala. 587.

So the owner of land who contracts with various masons and builders, for the erection of a party wall, is liable in tort for the damages and injuries that follow its collapse resulting from its defective and unsafe erection, regardless of the fact that the casualties were entirely attributable to the negligence of the masons or builders.²³³ He has the same duty to keep on his own land a house or wall built thereon, as the filth in his cesspool, or the water in his reservoir, or the snow and ice on his roof. His duty, in the language of Baron Parke, is to keep it in such a state that his neighbor may not be injured by its fall.²³⁴ This distinguished judge is sustained in the views expressed by Baron Bramwell in a subsequent case, as is clear from the following language: "What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for his own purpose; in the case of the chimneys some one has put a ton of brick fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not. I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if, through any defect, though latent, the water escaped or the bricks fell."²³⁵

Taking the case of the party wall and the relations of the masons to the owner, in such a case the former alone would be responsible to third parties injured through their negligence, of matters plainly collateral to the contract, as where the injury results from improper staging or scaffolding, or on improperly depositing materials or handling tools. But where the very thing stipulated to be done is improperly done whereby injury results to another, the employer is responsible for it, at least after having duly accepted the work of the contractors.²³⁶ The liability thus imposed disappears in the presence of such contributory negligence on

²³³ See *People v. Bueddensick*, 103 N. Y. 501.

²³⁴ *Chauntler v. Robinson*, 4 Exch. 163.

²³⁵ *Nichols v. Marspand*, L. R. 10; Ex. 259.

²³⁶ *Fletcher v. Rylands*, L. R. I. Ex. 280, and L. R. 3 H. L. 340; *Chicago v. Robbins*, 2 Black. 418; *Conners v. Hennessy*, 112 Mass. 96; *Boswell v. Laird*, 8 Cal. 469, 498.

the part of the injured party as will fairly raise a presumption that had he been in the exercise of due, or even ordinary care, the injury would not have happened, or where the injury is attributable to "*Vis Major*," or act of God, or mob violence and the unauthorized acts of others, such as the owner could not be supposed to anticipate.²³⁷ The opposite views have been unavailingly argued in a number of instances.

The question whether a contract having relation to lands is personal, or whether it constitutes a charge upon the lands, obviously must be determined by a consideration of the expressed intentions of the parties, and of the existence of any interest in the land raised by force of its covenants. Words of grant are not essential to create the interest, and a covenant may be construed as a grant. Such a construction has been given where the covenant related to a right of way over land.²³⁸ In *Hart v. Lyon*, 90 N. Y. 663, the contract for the party wall was held unenforceable against a purchaser at a sale in foreclosure, for being merely a personal obligation; but the covenant that the expense of repairing or rebuilding the party wall should be borne equally by the parties, "their respective heirs and assigns," was regarded as a covenant running with the land. The court so held in that case, because, as they say, "it is evident that it was the plain import of the instrument that the portion which bound the heirs and assigns should be construed as perpetual and as running with the land." Without any other reference to or discussion of the many cases which bear upon the subject of the nature of the obligation of a contract, in its connection with land, we may rest upon the rule that where the covenant concerns land, and is one which is capable of being annexed to the estate, and it appears that it is the intention of the parties as expressed in the instrument, then it shall be construed as running with and charging the land thereafter.

In *Campbell v. Mesier*, 4 Johns. Ch. 334, a party wall, standing equally on two lots, having become ruinous, the owner on one side, against the will and in spite of the prohibition of

²³⁷ *Mahoney v. Libbey*, 123 Mass. 20, and cases cited.

²³⁸ *Holms v. Seller*, 3 Lev. 305.

the adjacent owner, pulled down the wall and rebuilt it higher than it was originally. It was held that the adjacent owner was bound to contribute to the expense of the new wall, but not to the extra expense of making it higher than the old. There is no intimation in the case that the increase of height was wrongful.

In *Partridge v. Gilbert*, 15 N. Y. 601, the new wall built by the defendant was not only higher, but its foundations were deeper than the old wall which it replaced. The right to make these additions was not, however, discussed in the case, and perhaps there was no occasion to discuss it; the action being brought by the tenant of the adjacent lot, whose goods were injured in making the repair, and not by the own

In *Eno v. Del Vecchio*, 4 Duer. 53, it was held that the owner on one side of a party wall might, for the purpose of improving his own premises, underpin the foundation of the wall and sink it deeper if he could do so without injury to the building on the adjoining lot; also, that he might increase, within the limits of his own lot, the thickness, length, or height of the wall, if he could do so without injury to the building on the adjoining lot. Whether he could raise the whole party wall higher, or whether any additional elevation must be wholly within the limits of his own lot, the court expressly declined to decide.

Certainly the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement.

In *Sherred v. Cisco*, 4 Sandf. 480, it was held that, where a party wall was destroyed by fire, the law would imply no obligation on the adjoining owners to join in rebuilding a new wall, where there was no agreement so to do, the parties being remitted to their original unqualified title up to the division line. And Denio, C. J., in speaking of that case, declares that he sees no solid distinction between a total destruction of the walls and buildings, and a state of things which would require the whole to be rebuilt from the founda-

tion; that in either case there is great force in saying that the mutual easements have become inapplicable.²³⁹

In *Cheeseborough v. Green*, 10 Conn. 318, which was an action on the case, brought by the owner of the lower part of a store against the owner of the upper part and roof, to recover damages for suffering the roof to be out of repair, the court held that the action could not be sustained, suggesting that the plaintiff could have relief only in a Court of Chancery.

The civil law recognizes the existence of an easement to compel the owner of the servient tenement to repair, as distinguished from the ordinary easement of support; but the additional obligation to repair can only arise from express stipulation, or by proof of a prescriptive right to the easement of repair as well as support.²⁴⁰

An addition to a party wall made by one of two adjoining owners of land entirely on his own land, for the purpose of strengthening and thickening the wall and foundation so as to support a higher building, does not become a part of the party wall, and the other adjoining owner, who subsequently uses the wall as strengthened in increasing the height of his building, but who does not project his timbers beyond that portion of the wall standing on his land, though liable under his deed to pay for the half of the original division wall erected on his land, cannot be restrained from making such use of the addition, or made liable for a portion of its cost.²⁴¹

"Land covered by a party wall remains the several property of the owner of each half, but the title of each owner is qualified by the easement to which the other is entitled of supporting his building by means of the half of the wall belonging to his neighbor."²⁴²

As I have read the law from the statement of eminent judges, a tenant in common has a right to pull down when the wall is neither defective nor out of repair, if he only wishes to improve it, or put up a better or handsomer one. Chancellor Kent was of the same opinion. In the following passage from his commentaries (vol. 3, p. 437), he assumes

²³⁹ *Partridge v. Gilbert*, 15 N. Y. 601; *Kerr on Injunctions*, 376.

²⁴⁰ *Gale on Easem.* 4th ed. 312

²⁴¹ *Walker v. Stetson*, 162 Mass. 86.

²⁴² *Ingals v. Plamondon et al.*, 75 Ill. 118.

the rights as settled: "If there be a party wall between two houses, and the owner of one of the houses pulls it down in order to build a new one, and with it he takes down the party wall belonging equally to him and his neighbor, and erects a new house and wall, he is bound on his part to pull down and reinstate it in a reasonable time, and with the least inconvenience."

And from the remarks of Chief Justice Bartol, in *Glenn v Davis*, 35 Md. 219, it may be readily inferred that the opinion of that court was the same.

§ 200. **Division fences.** Fences are largely regulated by local laws. Boundary fences are built on the line and when made as intended by law, the cost is borne equally between the parties. A partition fence is presumed to be the common property of both owners.²⁴³

In general, fences on boundaries are to be built on the line, and the expense, when made no more expensively than is required by the law, is borne equally between the parties. See the following cases on the subject: 2 Miles, 337, 395; 2 Greenl. 72; 11 Mass. 294; 3 Wend. 142; 2 Metc. 180; 15 Conn. 526; 2 Miles, 447; Bouv. Inst. Index, h. t.

The law has been thus stated: "If I build a fence upon my neighbor's land, it is his, not mine; and the dominion which every man has over his own property, gives him a right to remove it whenever he pleases."²⁴⁴ If it be useful to me as well as to him, and if I build it in consideration of his promise that it should stand there forever, and he removes it in violation of that promise, I may recover in an action on the contract the value of my labor, and, perhaps, for the consequential injury. On no principle known to the law can I maintain an action of trespass."²⁴⁵ But it is held that when one of two conterminous proprietors erects a division fence, and, by mistake, places it on the other's land, he is entitled to remove it to the true line, within a reasonable time after discovering the mistake.²⁴⁶

²⁴³ Anderson's Law Dict. tit. Fences.

²⁴⁴ Matson v. Calhoun, 44 Mo. 368; see Clowers v. Sawyer, 1 Head. 156.

²⁴⁵ Clowers v. Sawyer, 1 Head. 156.
²⁴⁶ Black, J., in Dietrich v. Berk, 24 Pa. St. 470, 472.

Covenants to maintain division fences are held to run with the land, and the future grantees of the covenantor are held to an observance of his covenant.²⁴⁷ Unless a release is provided by statute, contracts to erect and maintain a division fence are irrevocable except by mutual consent.²⁴⁸ They are, in their nature, real estate, belonging to the owner of the land, and pass by his deed of the land, without being expressed or designated as part of the thing granted.²⁴⁹

a. *Generally regulated by statute.* As stated, the subject of partition fences is generally regulated by statutes; and it may be stated in general terms that such statutes ordinarily require adjacent owners of improved lands to contribute equally to the maintenance of partition fences, provide for the assignment by fence-viewers, town trustees, or other proper officers, of the portion of fence which each owner is to build and maintain, and for the appraisement by such officers when necessary to the adjustment of the mutual rights of the parties, of the value of fences erected or repairs made, and prescribe suitable methods of enforcing the adjudications of those officers. These statutes regulating partition fences are in the nature of police regulations.²⁵⁰

In some of the States the owner of land is required by statute to fence it, and he is deprived of all right to complain of trespasses by animals committed by reason of the want of a fence.²⁵¹ But a statute of this kind is to be construed as having reference to domestic animals properly restrainable by fences, as horses, cattle, sheep, etc., and not to animals not restrained or kept within bounds by common fences. As to them the principle of the common law remains in force, and their owner must keep them at his peril.

Where land is enclosed in common, by agreement, this releases each party from obligation to build a partition

²⁴⁷ *Easter v. Little Miami R. R. Co.*, 14 Ohio St. 48; *Bronson v. Coffin*, 108 Mass. 175; *Kellogg v. Robinson*, 6 Vt. 276.

²⁴⁸ *York v. Davis*, 11 N. H. 241.

²⁴⁹ *Murray v. Van Derlyn*, 24 Wis. 67; *Mott v. Palmer*, 1 Comst. (N. Y.), 564.

²⁵⁰ *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *McKeever v. Jenks*, 59 Iowa, 300; *American and English Ency. of Law*, vol. 7, page 896.

²⁵¹ See *Studwell v. Ritch*, 14 Conn. 292; *Hine v. Wooding*, 37 Id. 123; *Van Leuven v. Lyke*, 1 N. Y. (1 Comst.), 515, 517.

fence, and each is liable to the other for damages from his cattle.²⁵²

Where two owners of adjoining lands fence their land in common, but have no partition fence, the owner of each tract is liable for trespasses committed by his cattle on the other's land.²⁵³

In a Vermont case it was said that "under our more recent statutes, the law now is in this State, as it ever has been in England and other of the American States, that the owner of land is under no obligation to fence his land along the highway. The obligation in this respect results only from his duty to restrain his own cattle from trespassing upon his neighbor."²⁵⁴

b. *Railroad fences.* A law requiring railroads to fence and to pay value of cattle killed, has been enforced in several States.²⁵⁵

Where no statutes exist, and no obligation is imposed by covenant or prescription, a railway company is no more bound to fence its land than an individual.²⁵⁶ And if cattle are suffered to run at large, and are injured or killed on the track of a railroad, without wantonness, or such gross

²⁵² *Winters v. Jacob*, 29 Iowa, 115; *Montgomery v. Handy*, 63 Miss. 43; *Milligan v. Wehinger*, 68 Pa. 235.

²⁵³ *Baker v. Robbins*, 9 Kan. 303; *Markin v. Priddy*, 40 Id. 684, overruling *Markin v. Priddy*, 40 Id. 462; *O'Riley v. Diss*, 41 Mo. App. 184.

²⁵⁴ *Barret, J.*, in *Holden v. Shattuck*, 34 Vt. 336, 343. And see *Chambers v. Matthews*, 18 N. J. Law. 368.

²⁵⁵ *Ohio & M. R. Co. v. Clutter*, 82 Ill. 123; *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 338; *Cleveland, C. C. & I. R. Co. v. Newbrander*, 40 Ohio St. 15; *Heskett v. Wabash, St. L. & P. R. Co.*, 61 Iowa, 467; *Texas & St. L. R. Co. v. Young*, 60 Tex. 201; *Chicago, M. & St. P. R. Co. v. Dumser*, 109 Ill.

402; *McCall v. Chamberlain*, 13 Wis. 637; *Blair v. Milwaukee & P. du Ch. R. Co.* 20 Id. 262; *Gorman v. Pacific R. Co.* 26 Mo. 441, 72 Am. Dec. 220; *Nall v. St. Louis K. C. & N. R. Co.*, 59 Mo. 112; *Trice v. Hannibal & St. J. R. Co.* 49 Mo. 438; *Speelman v. Missouri Pac. R. Co.* 71 Id. 434; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

²⁵⁶ *Dean v. Sullivan Ry.*, 2 Fost. (N. H.), 316; *New York & Erie Ry. Co. v. Skinner*, 19 Pa. St. 298; *Hurd v. Rutland, etc., R. R. Co.*, 25 Vt. 116; *Northeastern R. R. Co. v. Sineath*, 8 Rich. (S. C.), 185; *Williams v. Mich. Cent. R. R. Co.*, 2 Mich. 259; *Clark v. Syracuse, etc., R. R. Co.* 11 Barb. 112; *Vandergrift v. Delaware R. R. Co.*, 2 Houst. (Del.), 297.

negligence as might amount to the same thing, the owner has no recourse against the company or its servants.²⁶⁷

The United States Supreme Court, in discussing the Missouri fencing law, and its constitutionality under the police power, uses this emphatic language: "In few instances could the power be more wisely or beneficially exercised than in compelling railroad corporations to enclose their roads with fences, having gates at crossings, and cattle guards. The speed and momentum of the locomotive renders such protection against accident, in thickly settled portions of the country, absolutely essential. The omission to erect and maintain such fences and cattle guards, in the face of the law, would justly be deemed gross negligence."²⁶⁸ Thus, while the statute only imposes upon the corporation, as a penalty for the non-observance of the law, double damages for animals killed or injured, the duty to fence is made obligatory. The duty is absolute and unqualified, and is reasonably supposed to have been intended for the protection of all persons upon railroad trains, who are exposed to danger by such obstructions, whether they be passengers or employes. The right of a passenger to recover for personal injuries incurred on account of such negligence has been declared,²⁶⁹ and also of a parent to recover for the death of an infant child who wandered upon a railroad track, by reason of a defective fence, and was struck by a train.²⁶⁰

Well-considered opinions hold that a right of action also accrues to an employe, engaged upon a railroad train, for injuries received without his own fault, by reason of the negligence of the corporation in failing to comply with the fencing stat-

²⁶⁷ *Railroad Co. v. Skinner*, 19 Pa. St. 298; *Housatonic R. R. Co. v. Knowles*, 30 Conn. 313; *Galpin v. Chicago, etc., R. R. Co.*, 19 Wis. 604; *Brown v. Hannibal, etc., R. R. Co.*, 33 Mo. 309; *Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 351.

²⁶⁸ *Missouri Pac. R. Co. v. Humes*, 115 U. S. 522; 29 L. ed. 466.

²⁶⁹ *Blair v. Milwaukee & P. du Ch. R. Co.*, 20 Wis. 254; *Fordyce v.*

Jackson, 56 Ark. 597; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371; 11 L. R. A. 486.

²⁶⁰ *Keyser v. Chicago & G. T. R. Co.*, 56 Mich. 559, 56 Am. Rep. 405; *Struettgen v. Wisconsin Central Co.*, 80 Wis. 498; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 484; *Singleton v. Eastern Counties R. Co.*, 7 C. B. (N. S.) 287; *Chicago, B. & Q. R. Co. v. Grablin (Neb.)*, 56 N. W. Rep. 797.

ute. It has so been held, under a similar statute, by the New York Court of Appeals.²⁶¹

c. *Barbed wire fences.* Unless under the control of some statutory enactment, there is no objection to the erection of a barbed wire fence. All that is expected from the owner of such a fence is that he will keep the same in a reasonable state of repair. The wire should be kept at a proper height and tension. And an Indiana case has held that the owner of a piece of property adjoining the highway which he has protected from intrusion by a barbed wire fence, must not allure cattle straying along the highway by the presence of tempting forage or the sight of other cattle feeding there.²⁶² This is a very fanciful doctrine. We cannot believe that the court divested itself of its very best judgment when it pronounced this opinion. At common law the owner of land was not obliged to fence it. But by statutory provision in most of the States, railways are required to maintain fences and cattle guards along the line of their roadbed. In this country, as we have seen, the matter is largely under the control of local statutes.

d. *Rules of the Massachusetts court regulating this subject.* In the well considered case of *Rust v. Low*, 6 Mass. 90, the following principles appear to be recognized and established:

1. At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription.

2. When a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle but those which were rightfully in the adjoining close.

3. A man, though not bound to fence against an adjoining close, was still bound at his peril to keep his cattle on his own close, and prevent them from escaping.

4. The legal obligations of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no written agreement has been made, rest on the statute.

5. An assignment, pursuant to the statute, imposes the same duty as would result from a prescription.

²⁶¹ *Donnegan v. Erhardt*, 119 N. Y. 472, 7 L. R. A. 527.

²⁶² *Sisk v. Crump*, 112 Ind. 504.

6. Where there is no prescription or agreement the provisions of the statute oblige a tenant, liable to make the partition fence, or any part of it, to fence only as in the case of prescription at common law; that is, against such cattle as are rightfully on the adjoining land.

7. Every person may maintain trespass against the owner of cattle which trespass upon his land, unless such owner can protect himself by the provisions of the statute, or by a written agreement, or by prescription.²⁶³ The general doctrines as above stated have been frequently affirmed, in the State of Maine and elsewhere.²⁶⁴

In Massachusetts, the doctrine has always been recognized that the owner or occupier of land may be bound by prescription to a more extensive obligation to keep up and repair the division fences than would be imposed upon him by the common law or by the statutes of the commonwealth.²⁶⁵ In *Binney v. Hull*, 5 Pick. 503, 506, it was adjudged that the owner of one of two adjoining lots of land might be bound by prescription to maintain the fence between them, and Chief Justice Parker spoke of the right to have him do so as an easement in his land.

In *Easter v. Little Miami Railroad Co.*, 14 Ohio St. 48, after a careful review of the leading cases in this commonwealth and elsewhere, a positive opinion was expressed that, in a deed to a railroad corporation of a right of way over land of the grantor on which its tracks had been laid out, a covenant that the grantor, his heirs and assigns, would build and forever keep up a fence on each side thereof through the grantor's land, was a covenant running with that land; and it was held that an assignee of that land was so far bound thereby that he could derive no advantage from its breach.

The only difference of opinion manifested in the cases cited, as to the operation of an agreement to build a fence,

²⁶³ *Little v. Lathrop*, 5 Me. 356; *Lyons v. Merrick*, 105 Mass. 71.

²⁶⁴ See *Lord v. Wormwood*, 29 Me. 282; *Lawrence v. Combs*, 31 N. H. 331; *Lyman v. Gipsen*, 18 Pick. (Mass.) 422; *Coxe v. Robbins*, 4 Halst. (N. J.) 384; *North Penn. R. R. Co.*

v. Rehman, 49 Pa. St. 101; *Holladay v. Marsh*, 3 Wend. 142.

²⁶⁵ *Rust v. Low*, 6 Mass. 90, 94, 97; 2 Dane Abb. 659, 660; *Minor v. Deland*, 18 Pick. (Mass.) 266, 267; *Thayer v. Arnold*, 4 Met. (Mass.) 589, 590.

by way of charging the land with the obligation, has been where it expressed the undertaking of the grantee in a deed poll. If a grantee accepts such a deed, a promise binding himself and his representatives personally is doubtless implied.²⁶⁶

But in *Parish v. Whitney*, 3 Gray, 516, it was held that such a clause, even if purporting to bind the grantee's heirs and assigns, was not a covenant in any sense, and did not create an incumbrance upon the land. If that decision can be supported, it must be as falling within the rules that no easement in or right affecting real estate can be created by contract of the party, except by deed, and that an agreement not sealed by the party who is to perform it cannot create a covenant or run with the land.²⁶⁷ On the other hand, it has been held in Vermont and New Hampshire, that such a promise by the grantee in a deed poll, for the benefit of the adjoining land of the grantor, who retained no other interest in the land granted, was equivalent to a covenant running with the land, and created an incumbrance thereon.

In *Schworer v. Boylston Market Association*, 99 Mass. 285, the provision in the deed establishing the passageway declared that it should "not be subject to have any fence or building erected thereon;" and this was held to give a right to have the entire court or passageway kept open to the sky, for light, air and prospect, and every other accommodation and advantage which such an open court might furnish to an estate abutting upon it.

In *Brooks v. Reynolds*, 106 Mass. 31, the passageway was declared in the deed to be for light and air, and was always to be kept open for the purpose aforesaid, and this was held to give a right to the open and unobstructed passage of light and air from the ground upwards, and throughout the length of the passageway.

In the case of *Salisbury v. Andrews*, 128 Mass. 336, the tenants in common had laid out their land in Boston with a pas-

²⁶⁶ *Minor v. Deland*, 18 Pick. 266; *Newell v. Hill*, 2 Met. 180.

²⁶⁷ *Dyer v. Sanford*, 9 Met. 395; *Goddard v. Dakin*, 10 Id. 94; *Morse*

v. Copeland, 2 Gray, 302; *Maine v. Cumston*, 98 Mass. 317, 320; *Wright v. Wright*, 21 Conn. 329, 342; *Bickford v. Parson*, 5 C. B. 920.

sageway or court, upon both sides of which they had erected buildings fronting upon the way; and, by a deed of partition of the property, they provided that the way "shall be left and always lie open for the passageway or court aforesaid, for the common use and benefit of both of said parties and their respective estates." It was held that the right of an owner under this deed was not simply a right of way, but a right to the use and benefit of an open court, extending as well to the light and air above as to the actual travel upon the surface of the earth.

e. *Where the doctrine of prescription applies.* In the Court of Appeals of New York Chief Justice Denio assumed as settled beyond question, that there might be a valid prescription by which the owner of land might become bound to maintain perpetually the whole of the division fence between his and the adjoining land; and said that he did not entertain doubt but that when such prescription is established, it fastens itself upon the land charged with the burden, and in favor of the tenement benefited by it.²⁶⁸ That covenants to erect and keep in repair division fences are covenants running with the land and as such binding upon the covenantor, must be regarded as settled law in that jurisdiction.²⁶⁹ See, also, in further confirmation of this view, *Easter v. Little Miami Railroad Co.*, 14 Ohio St. 48; *Kellogg v. Robinson*, 6 Vt. 276; *Burbank v. Pillsbury*, 48 N. H. 475.

§ 201. **Servitude of drip and drain.** Kent says the servitude of drip is that by which one man engages to permit the waters flowing from the roof of his neighbor's house to fall on his estate.²⁷⁰ And if such a permit continues, for a period of twenty years, the law will indulge the presumption of a grant of the right so to use it.²⁷¹ Such easements and servitudes as the above may be created by reservation but not by parol, although they may arise by prescription or dedication.²⁷² It is held that acquiescence in what would be a nui-

²⁶⁸ *Adams v. Van Alstine*, 25 N. Y. 232.

²⁶⁹ *Bain v. Taylor*, 19 Abb. Pr. 228.

²⁷⁰ 3 Kent's Com. 436.

²⁷¹ *Underwood v. Waldron*, 33

Mich. 232; *Cherry v. Stein*, 11 Md. 1; *Simons v. Pollard*, 53 Vt. 343; *Martin v. Stimpson*, 6 Allen, 102.

²⁷² *Hills v. Miller*, 3 Pai. 256; *Child v. Chappell*, 5 Seld. 246; *Rose v. Bunn*, 21 N. Y. 275.

sance, unless done by permission, will raise a presumption of the existence of a grant.²⁷³

As to the right of drainage over another's land the legal situation is briefly this: Such an easement constitutes an incumbrance, but is not a breach of the covenant for quiet enjoyment. Easements of this description arise where a grantor conveys to two different parties two houses with a drain under each connecting with a public sewer. Here we have the grant of an easement, but not of any right in the land. The rule giving the easement where an owner sells adjoining houses is restricted to those cases where there is an outward sign of the servitude.²⁷⁴

§ 202. Abandonment. What facts will warrant the presumption that an easement has been abandoned? Unquestionably the law is well settled that an easement may be abandoned by the acts of a party indicating such an intent. In *Reg v. Chorley*, 12 Q. B. 515; 64 E. C. L., Lord Denman said: "We apprehend that an express release of the easement would destroy it at any moment, so the cessor of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time." And in the same case it was held that the cessor of use, for a long space of time, would be a strong fact to show the intention to abandon the right.²⁷⁵ The rule finds its best expression in *Gale on Easements*, 375, where it is stated that as "all easements are restrictions upon the natural rights of property, in every case of conflict between the interest of the owners of the dominant and servient tenements, the liberty of the latter is more favorably regarded by the law than the attempts of the former to limit it."

It has been held in a well considered case decided in Maryland in 1871 (opinion by Ch. J. Bartol), that an agreement made by a lessee for years to abandon an easement belonging to the estate, does not bind the reversioner unless he was a

²⁷³ *Norton v. Valentine*, 14 Vt. 239.

²⁷⁴ *Butterworth v. Crawford*, 46 N. Y. 349.

²⁷⁵ See also *Moore v. Rawson*, 3 B. & C. 332; *Crossley v. Ligtowler*, Law Rep. 2 Ch. App. 478.

party to the transaction or his subsequent ratification is clearly shown.²⁷⁶

In Washb. on Easem. 4th ed., p. 707, it is said that the question of abandonment is one of intention, but that time is not a necessary element therein. "A cessor to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release, without reference to time." And this proposition is fully sustained by authority.²⁷⁷ *Snell v. Levitt* is not, therefore, an authority for the proposition that an easement created by grant can be extinguished by non-user. Under the rule of that case, an intention to abandon must exist in connection with and as a cause of non-user.

§ 203. **The term license defined.** A license may very properly be defined as a permit or authority to enter on land and do certain acts, the parties not intending to convey any interest in the land. It is well settled that such a license need not be in writing to avoid the inhibitions of the Statute of Frauds. Thus, a parol license to enter on land for the purpose of cutting timber, or gathering the growing crops is perfectly valid.²⁷⁸ So an agreement for a seat in a theater, or other place of amusement, is a license merely.²⁷⁹ In like manner an agreement for lodgings in a hotel or boarding house, though the rooms the boarder is to occupy are designated, does not create an interest in land but only a license.²⁸⁰

Bouvier says a license is either a bare authority, without interest, or it is coupled with an interest. A bare license must be executed by the party to whom it is given in person, and cannot be made over or assigned by him to another; and, being without consideration, may be revoked at pleasure, as long as it remains executory,²⁸¹ but when carried into effect,

²⁷⁶ *Glenn v. Davis*, 35 Md. 208; see also Washb. Easem. 450; *Webster v. Stevens*, 5 Duer, 553.

²⁷⁷ *Pope v. Devereux*, 5 Gray, 409; *Reg v. Chorley*, 12 Q. B. 519; *Moore v. Rawson*, 3 Barn. & C. 322; *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399; *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 143; *Crain*

v. Fox, 16 Barb. 184; *Cartwright v. Maplesden*, 53 N. Y. 622.

²⁷⁸ *Whitemarsh v. Walker*, 1 Met. 313.

²⁷⁹ *McCrea v. Marsh*, 12 Gray, 211; *Burton v. Scherpf*, 1 Allen, 133.

²⁸⁰ *White v. Maynard*, 111 Mass. 250.

²⁸¹ 39 Hen. VI. M. 12, 7.

either partially or altogether, it can only be rescinded, if in its nature it will admit of revocation, by placing the other side in the same situation in which he stood before he entered on its execution. When the license is coupled with an interest, the authority conferred is not properly a mere permission, but amounts to a grant, which cannot be revoked, and it may then be assigned to a third person. When the license is coupled with an interest, the formalities essential to confer such interest should be observed.²⁸²

The word license, as applied to real property, imports an authority to do some act or series of acts upon the land of another. It passes no interest in the land itself and its only effect is to legalize an act which in the absence of the license would constitute a trespass. It may be created by parol, although a writing defining the exact nature and scope of the license is preferable, and it is subject to revocation unless subsidiary to some valid grant, to the beneficial enjoyment of which the license is an adjunct, or is founded upon a valuable consideration. Under some circumstances it is created by implication. Licenses to do a particular act do not trench upon the policy of the law which requires that bargains, respecting the title or interest in real estate shall be by deed or in writing. But a permanent right to enter upon another's land without his consent, at all times is an important interest that should be evidenced by some written agreement.²⁸³ Generally it may be said that a license is not assignable, as it is in the province of the owner of the realty to determine who shall enter upon his premises. The doctrine of the early cases which converted an executed license into an easement is accorded but scant respect as being in the teeth of the Statute of Frauds.²⁸⁴

In *Morrill v. Mackman*, 24 Mich. 282, 9 Am. Rep. 124, the court said: "A license is a permission to do some act or series of acts on the land of the licensor, without having any per-

²⁸² Bouvier's Law Dict. 45.

²⁸³ See *Cook v. Stearns*, 11 Mass. 537; *Oliver v. Rumford Chemical Works*, 109 U. S. 82; *Washburn v. Gould*, 3 Story, 162; *Sun Printing*

Association v. Tribune Association, 44 N. Y. Sup. Ct. 140.

²⁸⁴ *Johnson v. Skillman*, 29 Minn. 97; *Jackson v. Philadelphia R. R. Co.* 4 Del. Ch. 181; *Gale, Easem.* 61; 3 Kent's Com. 452.

manent interest in it (citing cases). It is founded on personal confidence, and therefore not assignable.²⁸⁶ It may be given in writing or by parol; it may be with or without consideration; but in either case it is subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. Where nothing beyond a mere license is contemplated, and no interest in the land is proposed to be created, the Statute of Frauds has no application, and the observance of no formality is important. But there may also be a license where the understanding of the parties has in view a privilege of a less precarious nature. Where something beyond a mere temporary use of the land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purpose of the permission; wherever, in short, the purpose has been to give an interest in the land, there may be a license, but there will also be something more than a license, if the proper formalities for the conveyance of the proposed interest have been observed. What that interest shall be called in the law may depend upon the character of the possession, occupancy, or use the promisee is to have, the time it is to continue, and perhaps, upon the mode in which the compensation, if any, is to be made therefor. It may be an easement or it may be a leasehold interest."

a. *Its revocable and irrevocable features.* Undoubtedly a bare license is revocable before it is executed, but there are licenses that are irrevocable though they relate to an entry upon and the occupation of real estate, and are by parol, as where the license is directly connected with title to personal property which the licensee acquired from the licensor at the time the license is given, whereby the license is coupled with an interest. Thus, where one sells personal chattels on his own land, and before a reasonable time to remove, forbids the purchaser to enter and take them, it was held to be a

²⁸⁶ 3 Kent's Com. 452; Browne, Stats. Fr. ec. 22.

license which could not be revoked within such reasonable time.²⁸⁶ A bare parol license, though without consideration, will furnish a justification for an act which would otherwise be a trespass,²⁸⁷ and such a license, though ordinarily regarded as personal, extending only to the party to whom it is expressly given, will nevertheless extend and apply to and protect the agents and servants of the licensee whenever from the circumstances it can be presumed that there was an implied license to such persons "as where a license is given to a man to remove a weighty matter, which requires the assistance of several other persons."²⁸⁸ A license necessarily implies the right to do everything without which the act cannot be done.²⁸⁹

It is said that a license coupled with an interest is where the party obtaining the license to do a thing also acquires a right to do it. In such a case the authority conferred is not a mere permission; it amounts to a grant, and it may be assigned to a third person.²⁹⁰

A mere license must be in law so revoked and its use abrogated, as to do no unnecessary injury to the licensee.²⁹¹ Where a license is revocable it is revoked by the conveyance of the land.²⁹²

A mere license, no matter how long enjoyed, is revocable at any time.²⁹³

²⁸⁶ *Parsons v. Camp*, 11 Conn. 525.

²⁸⁷ *Marston v. Gale*, 24 N. H. 177.

²⁸⁸ 2 Bouv. Inst. 568.

²⁸⁹ *Taylor, Land. & Ten.* sec. 766; *Curtis v. Galvin*, 1 Allen, 217.

²⁹⁰ 2 Bouv. Inst. 568; for an extended discussion see *Sterling v. Warden*, 51 N. H. 217.

²⁹¹ *Angel, Watercourses*, sec. 389, 391; *Houston v. Laffee*, 46 N. H. 505.

²⁹² *Carter v. Harlan*, 6 Md. 20; *Seidensparger v. Spear*, 17 Me. 123; *Harris v. Gillingham*, 6 N. H. 9.

²⁹³ *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Houx*

v. Seat, 26 Mo. 178, 72 Am. Dec. 202; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192; *Chase v. Second Ave. R. Co.* 97 N. Y. 384, 49 Am. Rep. 531; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 40.

Wheelock v. Noonan, 108 N. Y. 179; *Rhoades v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 40; *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 501; *Hazelton v. Putnam*, 3 Pinney, 107, 54 Am. Dec. 166—all declare in cases there cited that a license granted

A city had a right to abate the awnings as a nuisance in a summary manner.²⁹⁴

A license is considered as revoked upon an unqualified grant of the land, provided the license relates to such insignificant acts as cutting trees or taking gravel, gathering nuts, etc. The conveyance must be an absolute one.²⁹⁵

Where a license has been revoked after the expenditure of money by the licensee and contrary to the terms of the license, the cases are not agreed as to the remedy of the licensee, whether it is an action at law to recover for the breach of the contract, or in equity for specific performance.²⁹⁶ But equity will not allow the owner of the land to avail himself of improvements made by the licensee, without restoring the licensee to as good a situation as he stood before.²⁹⁷

The use of stairways in a building erected by several owners of land as a single structure, upon a single plan and upon a single contract, no matter whether the land was then partitioned or not, cannot be denied by the owners of that part which includes the stairways to the owners of another part, the upper floors of which can be reached in no other way. Such a situation discloses an apt instance of what is termed in equity an "irrevocable license"—one which cannot be revoked because the parties cannot be restored to their original position. The Pennsylvania courts have been particularly indulgent to this doctrine of executed or irrevocable licenses, and have held in a recent case that purchasers of real property so situated are chargeable with notice of an evident servitude existing thereon.²⁹⁸

A right of this character while not strictly an easement, is in the nature of one. It is really a permission or license, express or implied, to use the property of another in a particular manner or for a particular purpose. Where this permission has led a party to treat his own property in a way in

without consideration is revocable at pleasure; *Laing v. Americus*, 86 Ga. 756.

²⁹⁴ *Americus v. Mitchell*, 79 Ga. 807; *Pruden v. Love*, 67 Id. 190.

²⁹⁵ *Drake v. Wells*, 11 Allen, 141.

²⁹⁶ *Houston v. Laffee*, 46 N. H. 508.

²⁹⁷ *Hazelton v. Putnam*, 3 Chand. (Wis.) 117; *Story's Eq. sec.* 1237.

²⁹⁸ *Pierce v. Cleland*, 133 Pa. St. 189; see also *Swartz v. Swartz*, 4 Pa. 353.

which he would not otherwise have treated it, as by the erection or construction of permanent improvements thereon, it cannot be recalled to his detriment. Having expended his money upon the faith of it, and not being able to be restored to his original position, equity will not allow the permission to be revoked in breach of such faith.²⁹⁹

An executed license is treated like a parol agreement in equity. It will not allow the Statute of Frauds to screen a fraud; or allow advantage to be taken of the form of the consent; nor allow one to revoke his license when it was given or had the logical effect of so influencing the conduct of the licensee as to induce a large expenditure of money or labor. The ground of the jurisdiction is to prevent fraud or injustice. Its effect is to restrain a party from the exercise of his legal rights when it appears from all the elements in the case that unless equity intervenes his conduct has misled an innocent party to his injury and rendered the assertion of the right of revocation an act of bad faith amounting to constructive fraud. This interference of the equitable jurisdiction cannot be invoked except the facts relied upon to create the estoppel are clear to a demonstrable certainty, and the more stringently does this rule apply where the effect of the estoppel, if allowed to operate, will be to convey what, in its inception was a bare privilege, temporary and revocable in its nature, into an easement in the lands of the licensor, perpetually running with the land and transmissible from the licensee at pleasure.³⁰⁰

b. *Rights of the licensee.* A mere licensee has some rights. The land owner cannot shoot him. He cannot lawfully set spring guns and traps for him. The licensor is liable, even to a licensee, if he is guilty of what in the civil law is termed "*dolus*." But beyond this the licensor owes the licensee no duty, certainly not the duty of active diligence, to see that no harm comes to him, and when the latter without any invitation and pursuant to a mere license, enters the former's

²⁹⁹ Godard, Easem. 90; 1 Story, Eq. 329; Rodgers v. Cox, 96 Ind. 157; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Meek v. Brecken-

ridge, 29 Ohio St. 648; Russell v. Hubbard, 59 Ill. 335.

³⁰⁰ Jackson v. Philadelphia, W. & B. R. Co. 4 Del. Ch. 180.

premises, he takes the risk of whatever dangers may be there.³⁰¹

A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money a right, indefinite in point of duration, which cannot be forfeited by non-user, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a blast furnace, for instance, would be trivial when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure forever. But it is otherwise where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But, till then, it constitutes a right for the violation of which redress may be had by action. With this qualification it may safely be affirmed that expending money or labor, in consequence

³⁰¹ Reardon v. Thompson, 149 Mass. 267; Pollock, Torts, 426; Gautret v. Egerton, L. R. 2 C. P. 371; Rap. Neg. 23-25; Mathews v. Bensel, 51 N. J. L. 30; Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Pittsburg, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 369, 23 Am. Rep. 751; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54

Am. Rep. 718; Victory v. Baker, 67 N. Y. 366; Thiele v. McManus, 3 Ind. App. 132; Lary v. Cleveland, C. C. & I. R. Co. 78 Ind. 323, 41 Am. Rep. 572; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65; Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 399.

of a license to divert a water course or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity.

c. *Of parol licenses.* Where a parol license has been executed and acted upon, and expenses incurred in perfecting an easement over the land of another in reliance upon the parol license previously granted, it cannot afterwards be revoked without placing the licensee in *statu quo*.³⁰² In such cases equity holds, that for remedial purposes, the license shall be deemed an executed contract.³⁰³ The presumption which arises from an adverse user of more than twenty years, is that there was a grant, and this presumption can only be overcome by some proof that this user was by permission, or license, or in some other way not inconsistent with the rights of the owner of the land.³⁰⁴

It is now well settled in this country that, as between private persons, a parol license, though primarily revocable, is not so when the licensee has executed it, and in so doing has incurred expense. This doctrine was announced as far back as 3 Ga. 82, in *Sheffield v. Collier*, and again in *Macon v. Franklin*, 12 Ga. 239, in which Judge Nisbet said: "The rule is, as stated, that a parol license is revocable; but it has some exceptions. If the enjoyment of it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agreement for a valuable consideration, and he a purchaser for value."³⁰⁵ There are other cases decided by this court to the same effect, but the above will suffice. The quotation from Judge Nisbet's opinion is followed by these words: "In such cases the books say it would be against all conscience to permit the grantor to recall the license as soon as the benefit expected from the expenditure is beginning to be derived."

³⁰² Woodbury v. Parshley, 7 N. H. 237.

³⁰³ Snowden v. Wylas, 19 Ind. 14; Beatty v. Gregory, 17 Iowa, 114; Dempsey v. Kip, 61 N. Y. 462; Lacy v. Arnett, 33 Pa. St. 169; Meek v. Breckenridge, 29 Ohio St. 642.

³⁰⁴ Pierce v. Cloud, 42 Pa. 102; McAuther v. Carrie, 32 Ala. 75.

³⁰⁵ Pages 242, 243; see also Winham v. McGuire, 51 Ga. 578, and Southwestern Railroad v. Mitchell, 69 Id. 114.

d. *Who may grant.* The authority upon which the licensee relies for the justification of his acts must come from a competent source. Of course, no man can grant an authority which will interfere with the rights of others. The test would seem to be in general that the acts licensed must be such as the licensor himself could rightfully do. Thus, a license given by the owner to a plank-road company, to build a road across a lot, has no force if he has before leased the property.³⁰⁶

e. *Distinction between an easement and a license.* The distinction between an easement and a license is often so metaphysical, subtle and shadowy as to elude analysis. As said by the vice chancellor in *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 254: "The adjudications upon this subject are numerous and discordant. Taken in their aggregate, they cannot be reconciled; and, if an attempt should be made to arrange them into harmonious groups, some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification." But there are certain fundamental principles underlying most of the cases which enable courts to distinguish an easement from a license, when construed — as all instruments must be — in the light of surrounding circumstances. Mr. Washburn defines a license as "an authority to do a particular act or series of acts upon another's land, without possessing any estate therein." He defines an easement as follows: "An easement implies an interest in the land which can only be created by writing, or constructively its equivalent — prescription. A license may be created by parol. * * * It matters not whether the license be oral or in writing, in respect to its being parol, if the paper giving it have no requisites of a grant."³⁰⁷ Again he says: "So long as a license is executory, it may be revoked at the pleasure of the licensee." To the same effect are Washb. Easem. p. 6; *De Haro v. United States*, 72 U. S. (5 Wall. 599); 18 L. ed. 681; 3 Kent. Com. *453; Gould, Waters, secs. 322, 323; 1 Warvelle, Vendors, pp. 43, 44; 1 Sugden, Vendors, p. 177. The discussion of licenses, in a large number of the cases and

³⁰⁶ *Brown v. Powell*, 25 Pa. St.

³⁰⁷ 1 Washb. Real Prop. 629 (398).

authorities, grows out of licenses created by parol. Some of them hold such licenses to be revocable, even when a consideration is paid therefor; otherwise, it is said, they would defeat the operation of the Statute of Frauds.³⁰⁸ But there are other cases which hold that even parol licenses without consideration are not revocable when executed, and some of these authorities go to the extent of holding that such executed licenses are assignable. All of such authorities as hold such licenses irrevocable and assignable, treat them as in the nature of equitable estoppels. See the extensive notes to *Rerick v. Kern*, 2 Am. Lead. Cas. Hare & W.'s notes, p. 546, where the subject is exhaustively treated. It is universal, however, both upon principle and authority, that it requires words of grant to create an easement or a permanent interest in realty. And it is equally obvious that in construing instruments of all kinds the object of the court should be to ascertain the purpose and meaning of the parties thereto.

A license creates no interest in land. It is founded on personal confidence and is not assignable, and its continuance depends on the pleasure of the party giving it, and it is revocable unless executed under such circumstances as would authorize the interference of equity to prevent injustice. At law a license could not have the effect to create an interest in lands upon the theory of becoming irrevocable by applying the principle of estoppel, because courts of law concern themselves with the legal aspects of estates and cannot apply equities which spring from the rules of estoppel, against the owner of the land. Judge Cooley seems to regard it as a serious reproach to the law that it should fail to provide some adequate protection against the manifest injustice of a revocation after the licensee, in reliance upon his license, has made large and expensive improvements upon the land.³⁰⁹ The contention is not well founded for the obvious reason that the licensee is grossly in fault when he makes improvements upon the property of another upon the

³⁰⁸ See *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

³⁰⁹ *Maxwell v. Bay City Bridge Co.* 41 Mich. 467.

strength of a mere license. As well might the law be criticized for not providing a remedy for one who builds upon the estate of another. It is the pivotal duty of everyone who contemplates the substantial improvement of realty to know the limitations under which he acts and to inform himself of the situation of the title. Neither law nor equity should protect him in an invasion of another's property under any pretext short of some record title, and even this should be an invulnerable and indisputable one.

The law will imply a license from the necessities of individuals and from the usages of the community. Thus, it has been held that the entry upon another's close, or into his house, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass.

Persons who live in the vicinity of railroads, and who use the track, embankments of space between the tracks as a footpath, are wrongdoers unless permission is granted by the company to use the tracks, although pedestrians and the public generally travel over these without objection; people go there at their own risk and enjoy the license subject to their own perils.³¹⁰

A mere permissive use of the track by the public without objection on the part of the railroad company, does not alter the company's measure of duty, and a person walking on the track by the sufferance of the company, does so subject to the risks of so hazardous an undertaking, and if injured by a train of the company there is no liability unless the injury was willful.³¹¹

Mere passive acquiescence does not amount to license.³¹²

³¹⁰ *Grethen v. Chicago, M. & St. P. R. Co.* (Minn.) 19 Am. & Eng. R. R. Cas. 344; *Gaynor v. Old Colony & N. R.* 100 Mass. 208; *Georgia Cent. R. Co. v. Brinson*, 10 Ga. 207, 19 Am. & Eng. R. R. Cas. 42; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Baltimore & O. R. Co. v. State*, 62 Md. 479, 19 Am. & Eng. R. R. Cas.

83; *Baltimore & O. R. R. Co. v. Sherman*, 30 Gratt. 602.

³¹¹ *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 319, 8 Am. & Eng. R. R. Cas. 217.

³¹² *Bancroft v. Boston & W. R. Corp.* 97 Mass. 276; *Hogan v. Chicago, M. & St. P. R. Co.* 59 Wis. 139, 15 Am. & Eng. R. R. Cas. 439; *Baltimore & Ohio R. Co. v. Sher-*

It is the duty of the railroad to give signals to keep persons off of its right of way only at public crossings.

In a recent case it was said: "The ruling asked for lays it down as matter of law that if people are accustomed to cross a railroad track at a certain place, and the company makes no objection, this imports a license from the company, and that such a license imposes a duty to use reasonable care to protect the crossers. But, even if we are to assume the use of the crossing to be with knowledge of the company, it seems a strong thing to say that the very state of facts which, if continued twenty years, would create a right of way, on the presumption that the user was adverse, that is without a license,³¹³ shall be presumed up to the very last moment of the twenty years to have been with a license. We are aware that language has been used in other States which seems to sanction the plaintiff's proposition,³¹⁴ but we think it would be going quite as far as is possible if the fact of continuous crossing, standing alone, were allowed to be considered by a jury as evidence of a license."³¹⁵

Active vigilance is not required to see that a mere licensee on one's premises is not injured. A turntable on railroad lands, properly made and used, is not, even as to children of tender years, such a dangerous and enticing machine that the railroad company will be liable for injury to a child playing with it merely because it is in an unfenced lot near footpaths which the public are permitted to use.³¹⁶

Even if the public passed over a footpath crossing the tracks with the knowledge of the railroad company, and pedestrians passed along this pathway as mere licensees, the railroad owed such passers only the duty to do them no

man, *supra*; Norfolk & W. R. R. Co. v. Harman, 83 Va. 577.

³¹³ Johanson v. Boston & M. R. Co. 153 Mass. 57, 59.

³¹⁴ Barry v. New York Cent. & H. R. R. Co. 92 N. Y. 289, 292, 44 Am. Rep. 377; Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 649; Taylor v. Delaware &

H. Canal Co. 113 Pa. 162, 175, 57 Am. Rep. 446.

³¹⁵ See Sweeny v. Old Colony & N. R. Co. 10 Allen (Mass.), 368, 374, 87 Am. Dec. 644; case of Haggart v. Stehlin, L. R. A. 22, opinion by Holmes, J.

³¹⁶ Walsh v. Fitchburg R. Co. 145 N. Y. 301.

intentional harm and no burden of active vigilance was cast upon the defendant.³¹⁷

Other States have refused to follow the Stout Case, as reported in 17 Wall. 657.³¹⁸

§ 204. **How lost or extinguished.** It may be affirmed as an indisputable rule of law that any right whatever may be lost or terminated by (1) act of God — "*vis Major*" or (2) by operation of law; or (3) by the act of the party. These three methods may be safely relied upon to utterly annihilate any right that any party at any time could possibly hold.³¹⁹ And hence an easement may be destroyed by any or all the ways indicated. Merger is frequently relied upon to drown the rights acquired by easement. Wherever the dominant and servient estates come into the possession of the same person, the rights of easement are extinguished.³²⁰ And any act of the parties will work the destruction of the easement, if that act is, in legal effect, one from which such a result must follow.³²¹ So, a release may effect the same object. But the release should be in writing according to the case last cited. But a parol release clearly proven, under an allegation of fraud, would accomplish the same thing. In short, any method by which it can be fairly presumed that there was an intention to abandon, release, waive, or renounce the rights acquired under the easement will be effectual.

³¹⁷ Nicholson v. Erie R. Co. 41 N. Y. 531; Sutton v. New York Cent. & H. R. R. Co. 66 Id. 243.

³¹⁸ Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; Frost v. Eastern Railroad, 64 N. H. 220; Clark v. Manchester, 62 Id. 577; Bates v. Nashville, C. & St. L. R. Co. 90 Tenn. 36; Daniels v. New York & N. E. R. Co. 13 L. R. A. 248, 154 Mass. 349; Merriman v. Chicago, R. I. & P. R. Co. 85 Iowa, 634; Gay v. Essex Electric Street R. Co. 21 L. R. A. 448, 159 Mass. 238; Klix v. Nieman, 68 Wis. 271,

60 Am. Rep. 854; Twist v. Winona & St. P. R. Co. 39 Minn. 164; Maginnis v. Brooklyn, 7 N. Y. Supp. 194; Breckenridge v. Bennett, 7 Kulp, 95; Greene v. Linton, 7 Misc. 272; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365.

³¹⁹ Taylor v. Hamton, 4 McCord, 96.

³²⁰ Ritger v. Parker, 62 Mass. 147; Stuyvesant v. Woodruff, 21 N. J. L. 133; Colburn's App. 62 Pa. St. 274; Plympton v. Converse, 42 Vt. 712.

³²¹ Dyer v. Sanford, 50 Mass. 395.

CHAPTER XIII.

USES AND TRUSTS.

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§ 205. **Nature and definition of a use.** A use, at common law, was technically defined to be an equitable right, which he who conveyed a legal estate to another, reserved to himself upon trust and confidence that the person to whom he so conveyed it, would nevertheless suffer him to take the rents and profits of the land, and would execute estates according to his direction.¹ The person to whom the legal estate was conveyed, was called the feoffee or tertenant. He had the freehold or sole estate in him. The person who conveyed the legal estate to him was called the *cestui que use*.

They were originated by sacerdotal corporations to evade the statute of mortmain, and were gradually established to mitigate the intolerable evils of the feudal system, and save

¹ Gilbert's Law of Uses, 175.

landed estates from attainder, forfeiture and other incidents. In theory at least the use was rather a hold upon the conscience of the feoffee to uses, than a lien upon, or interest in the land; and the principle upon which it was founded was that the feoffee was bound in conscience to follow the direction of the feoffor. Thus, acting only upon the conscience, it differed essentially from incorporeal hereditaments which are of legal cognizance, and which were the subject of conveyance to uses.

"The ancient common law made the validity of a conveyance depend upon a visible act. The owner gave the purchaser a clod of earth, or other symbol of possession (as a twig). The ownership thus created admitted of no qualification. The visible owner was to all intents and purposes the actual proprietor. On this simple conception equity grafted the notion of '*uses*.' The owner of land could transfer it to an indifferent person by a visible symbol, and charge the transferee to hold it for the use of another. The conscience of the transferee was said to be affected by this transaction, and he was equitably bound to perform the trust imposed upon him. This obligation could only be enforced in a court of chancery, the presiding judge being an ecclesiastic. That court was supposed to proceed upon those principles that affect the moral sense."

As to the original meaning of uses and trusts, Mr. Stephen has very properly remarked that "the books are rather vague, and not always correct in their account." Blackstone says that "uses and trusts were in their original of a nature very similar, or rather exactly the same."³ Mr. Cruise also remarks that "the words use and trust were perfectly synonymous."⁴ There can be no doubt, however, that there might be "trusts" which involved no "uses" in the proper meaning of that term. Thus, Lord Bacon expressly distinguishes a "use" from a "special" or "transitory trust." Again, it is clear that a "trust" was referable rather to the person in whom the confidence was reposed; "use" to the

³ See Sir Henry Main's "Ancient Law," introduction by Hon. Theodore W. Dwight, LL.D.

³ 2 Bl. Com. 327.

⁴ Cruise's Dig. tit. xii. ch. 1, sec. 2.

person for whose benefit it was reposed. Thus, it is said by Lord Chief Baron Gilbert: "If the use be not a thing annexed to the land, it will be asked of me, what it is; to which I answer, that a use is an equitable right to have the profit of lands, the legal estate whereof is in the feoffee, according to the trust and confidence reposed in him."⁵ Mr. Stephen observes that uses and trusts were in their origin closely united, but not identical. A trust was the confidence reposed by one man in another, when he invested him with the nominal ownership of property, to be dealt with in some particular manner, or held for some particular person or purpose pointed out. If the trust was of a certain description, viz., to hold land for the benefit of another person generally, and to let him receive the profits, the sort of interest or right which consequently attached to the latter person was called a use, to distinguish it from the nominal ownership or estate of the trustee.⁶

A use was never executed except upon the co-ordination of three distinct circumstances, viz: (1) A proper party seized to a use; (2) A *cestui que use in esse*; (3) A use *in esse*, neither in reversion, possession, or remainder.⁷

§ 206. **Historical resume.** The doctrine of uses and trusts is of civil law extraction, and seems to have had a qualified existence under the Roman prætors, while in the codification of Justinian it was distinctly recognized. The English ecclesiastics seized upon these provisions of Roman legislation as a felicitous evasion of the prohibitions as to the alienation of lands, which the mortmain statute had fastened upon English jurisprudence. We have previously referred to these celebrated statutes, and it will be remembered that through the rapacity and greed of the ecclesiastical establishment, vast tracts of the most desirable land in England had passed under the domination of the church. To restrain the growing encroachments of the papal power, the mortmain statutes were enacted primarily with the dual design of crippling the church holdings on the one hand, and increasing the influence and authority of the

⁵ Gilb. Us. (by Sugden) 374.

⁷ Chudleigh's case, 1 Rep. 126.

⁶ Id.; 2 Burrill's Law Dict.

landed aristocracy on the other. Some method of neutralizing the effects of the mortmain statutes must be employed, and to Jesuitical cunning and scholasticism must be attributed the expansion of the doctrine of equitable estates. In a crude and primitive form the theory had already obtained a foothold previous to its formal introduction. The ecclesiastical tribunals seeking to enforce their behests by acting upon the conscience of the trustee, had succeeded, to a limited extent, in effecting many of the purposes that the present system of trusts is designed to cover. But these ecclesiastical courts, although in some respects well adapted to a nascent civilization, possessed no way of enforcing their decrees by judicial process. And the gradual emancipation of the human mind from the fetters of medieval superstition threatened to impair the efficacy of their mere decree, as it was soon discovered that the fulminations of "mother church" were not always successful in operating on the conscience of the trustee. Under the fostering care of the equity jurisdiction, the doctrine of uses expanded far beyond any limits ever even imagined by the Roman publicists. And in a comparatively short period nearly one-half of the habitable area of England was held by a trustee for some beneficiary. The political agitations of the times powerfully contributed to precisely such a result. The rival contentions of the powerful plutocratic houses of York and Lancaster had submerged the nation in protracted civil war, and by the process of attainder and confiscation the treasonable intrigues of refractory nobles could lead to but one result, the hopeless and irretrievable ruin of their rights in landed property through conviction of treason by some star chamber tribunal in the control of the particular faction, that for the time being, appeared uppermost. It must be remembered too, that treason at this period wrought corruption of blood, and properties thus confiscated passed forever from the dominion and control of their original owner. The doctrine of uses and trusts averted these calamities, and the refinements and subtleties engrafted upon the system by expert pundits in the law, only added more attractiveness to this particular species of land holding, and more safety to the agitators of civil turmoil. The pacification following the accession of

Henry VIII to the English throne gave the coveted opportunity for the crown lawyers to investigate the ramifications and subtleties of the doctrine of uses, and led to the enactment in 1536 of the celebrated statute that through all its vicissitudes retains its name if nothing else.

In its pivotal concept the scheme of uses aimed to transfer the use into actual possession, and make the *cestui que use* the absolute owner of the land, both in legal and equitable contemplation. It destroyed or demolished the estate of the feoffees to uses, and transferring it from them to the *cestui que use* abrogated its character as an equitable incident cognizable solely by chancery courts, and brought them under the direct impulse of the legal tribunals. These courts held that there were three essentials to the execution of a use under the statute of Henry VIII. (1) A person seized to the use of some other person; (2) A *cestui que use in esse*; and (3) A use *in esse* in possession, remainder, or reversion.⁶

Appended in a note will be found the text of the original statute taken from Reeves' History of English Law."

⁶ Chudleigh's case, 1 Co. 126a, and notes.

⁹ "Where any person or persons stood or were seized, or at any time thereafter should happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be; that in every such case all and every such person and persons and bodies politic, that have or hereafter shall have, any such use, confidence, or trust, in fee-simple, fee-tail, for term of life, or for years or otherwise, or any use, confidence or trust in remainder or reverter, shall from

henceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or to hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in the use, confidence or trust of or in the same; and that the estate, title, right and possession, that was in such person or persons, that were or hereafter shall be seized of any lands, tenements or hereditaments to the use confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust, after such quality, manner, form and

§ 207. **Comments on the Statute of Uses.** Uses had been very vigorously employed by the Roman ecclesiastics to evade the operation of the mortmain statute. They simply resorted to a feoffment to one person, who was to hold the land to the use of another. The High Court of Chancery held that the feoffee was, in such a case, bound in conscience and good faith to hold the property merely for the benefit of a third person. And this court alone recognized the existence of this trust estate. The *nisi prius* courts — or courts of common law jurisdiction — held the opposite view, and regarded the feoffee as the legal or real owner. By these contradictory views held by different courts, it is quite obvious that much confusion must result. Practically there were two estates in the same property, but cognizable in different courts. By this subterfuge many rules of real property were virtually annulled. The priesthood could hold land notwithstanding the mortmain statute. While a rebellious peer could foment sedition with perfect impunity so far as the forfeiture of his property was concerned. It is said that the Statute of Uses¹⁰ was enacted in order to remedy this condition of things. But it must be remembered that this royal “defender of the faith” was then in the zenith of his quarrel with the Vatican over the divorce of Catharine and the marriage with Anne Boleyn, and was already meditating, with the connivance of his chancellor — Cromwell — who had succeeded both the deposed Cardinal Wolsey and the accomplished Sir Thomas More, the suppression of the monasteries and the wholesale confiscation of their massive wealth for the benefit of the crown, and as a telling blow at papal supremacy in England. The covert object of the statute was to prevent attainted peers and landed proprietors from placing the

condition as they had before, in or to the use, confidence or trust that was in them.”

The phrase “stand seized to uses” is frequently used in relation to conveyances under the statute of uses. It imports a covenant to stand seized to uses, and is a species of conveyance which derives its

effect from the statute of uses, by which a man, seized of lands, covenants, in consideration of blood or marriage, that he will stand seized of the same, to the use of his child, wife or kinsman, for life, in tail or in fee. (2 Bouv. Inst. n. 2080.)

¹⁰ 27 Hen. VIII. c. 10.

reversion of their property beyond the royal clutch. This particular Tudor had posed in many attitudes, but even Mr. Froude will not undertake to depict him as a law reformer. Neither he nor his fawning chancellor could possibly foresee the ultimate results of this vile piece of class legislation. The statute to which is affixed his name was merely intended to concentrate the most arbitrary power in the hands of the sovereign and his court favorites — an infamous set — presided over by Somerset and Northumberland with that poor creature Cromwell as a sort of ring master. Before the statute was enacted uses could be created by a simple declaration, as it was purely a matter of trust and confidence, and the only way to create a future estate was by way of remainder, which required a particular estate to support it. Under the statute, however, uses might be created to spring up *in futuro*. They need not be executed at the time of their conveyance, as a fee could be “limited upon a fee” contingent upon the happening of some event. Hence, “uses” were said to be “future or contingent” when they operate as remainders, and are supported by some prior freehold estate, and they are “springing” when they arise without the support of such an estate. They were also designated as “shifting” when both the use and seizin shifted in derogation of some estate previously granted. It may be added that “resulting” uses were such as would arise whenever a use limited by a conveyance could not for any reason vest. In such case it was said to result to the grantor. Just here it will be seen that substantially the distinction between a “springing use” and an “executory devise” is this: The first requires a person to be seized to use whenever the contemplated contingency happens, while the latter does not exact any such requirement.

Henry’s scheme was largely subverted by the energetic action of the English courts of equity. The law courts, in their efforts to uphold the statute, gave to its interpretation a strict construction complying in this respect with the immemorial dictum that any statute in contravention of common law methods should be strictly construed. The glaring instances of hardship and injustice that this system of strict construction entailed, speedily roused the hostility of the

chancery jurisdiction, and in its efforts to administer justice and sustain its own dignity, and at the same time foster its ingrained animosity to the encroachments of royal prerogative, it held that uses, in many important cases, though *void at law, were perfectly good in equity*. And by impressing the characteristics of a "trust" upon what formerly had been a use before the statute of uses, it revived and revamped the old rights under a new baptismal name, while arrogating to itself the exclusive supervision of those rights. There were some modifications, and many extensions all along the lines of manifest improvement, and ultimately to the nimble wit of "my Lord Nottingham"—conspicuously the ablest of the English chancellors up to Mansfield—the present elaborate system of uses and trusts owes many of its beneficent functions. This same great chancellor drafted and enforced the passage of the famous "Statute of Frauds," and by his dexterous management and manipulation of the Statute of Uses in its textual misfortunes, he has wrung from Lord Hardwicke the confession that the whole effect of that elaborate piece of legislation upon which so many fond hopes were based was to "add three words to the form of a conveyance." Uses reappeared under the guileless name of "trusts." And trusts now embody all that formerly characterized as a "use"—with much additional significance." Pundits of the professorial ilk are constantly dilating upon the difference. While our judges and clear-headed lawyers are treating them as one and the same. If there is any distinction, the bench and bar don't know what it is, and care less. Practically they deal, in every instance, with a trust through a trustee for the advantage of a beneficiary. This, I maintain, is the gist of the matter. It is quite time these extravagant assumptions about "uses" were called to a new audit, and this paralytic flux of words on the subject of uses abated if possible. A sedative was administered years ago by Chancellor Kent, but the quacking continues in the very face of an utterance like this: "I presume the abolition of uses could not have had much effect. It was the abolition of a phantom. The word 'grant' is not more intelligible to the world at

¹¹ 4 Kent, 327, *et seq.*

large than the words 'bargain and sale;' and the fiction, indulged for two hundred years, that the bargain raised a use, and the statute transferred the possession to the use, was as cheap and harmless as anything could possibly be."

A use limited upon a use was not executed or even affected by the "Statute of Uses." The statute executes *only the first use*. In the case of a deed of bargain and sale, the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee. But the second use was held valid as a TRUST, and as such enforceable in equity.¹² The effect, then, of the entire travail, as Mr. Williams further remarks: "Was to import into the rules of law some of the then existing doctrines of the courts of equity, and to add three little words, viz: 'to the use,' to every conveyance."¹³

Sir William Blackstone says that: "In construing this Statute of Uses there were two particular obstacles which the common law judges found it hard to get over. For instance, they held that no use could be limited on a use, and that when a man bargains and sells his land which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void. Again, they held that as the statute mentions only such persons as were seized to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not seized but only possessed; and, therefore, if a term of one thousand years be limited to A. to the use of (or in trust for) B. the statute does not execute this use, but leaves it as at common law."¹⁴ The courts of equity speedily availed themselves of the dilemma in which the law courts thrust themselves by tenaciously striving to uphold this view, and by a judicious exercise of their peculiar jurisdiction, they wisely avoided in a great degree those mischiefs which the statute made intolerable. In the majority of instances the use was one which the statute could not execute, yet still they were trusts in equity which in conscience ought to be performed. To this the reason of mankind assented, and

¹² Jackson v. Cary, 16 Johns, 304; Cas. 444; Gilbert, Uses (Sugden's Franciscus v. Reigart, 4 Watts, note); 1 Williams, Real Prop. 181. 408; Roe v. Tranmar, 2 Sm. Lead.

¹³ Williams, Real Prop. 159, 160.

¹⁴ 2 Bl. Com. chap. 20.

the old doctrine of uses was revived, under the denomination of trusts; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.¹⁵

§ 208. **Doubts as to its introduction in this country.** We may safely affirm that the modern view of trusts traverses the same ground formerly occupied by uses before the Statute of Uses. It not only does this but goes far beyond it. Mr. Story considers it a very fortunate circumstance that our equity jurisprudence did not reach its matured expansion until the rules regarding the management of equitable estates had been well settled by the English Court of Chancery. The assertion is constantly paraded by superficial writers on this subject that the Statute of Uses has been adopted in the different States of this country, "as part of the common law" so that it prevails generally throughout the United States. This is one of those detestable half truths so pernicious in their influence and so difficult to smother. In the first place the Statute of Uses never was a part of the common law. It was a parliamentary enactment in the time of Henry VIII. Before its passage uses, in a crude and primitive condition, formed a part of the common law. But the modern doctrine of "trusts," founded on these primitive notions of uses, was of protracted gestation. In the second place, at the time of the colonization of America, the entire subject was in a chaotic state even in the English chancery. It was not until the opening of the 18th century that it assumed distinct and symmetrical proportions, and our most eminent authorities agree in the assertion that on this side of the Atlantic, equity practice in any form had not even a faint recognition until long after the Revolution.¹⁶ The legitimate inference from these repeated statements regarding the domestication of the "Statute of Uses" as part of the common law is, that our courts, even in colonial times, were well acquainted with the subject. Whereas, as matter of fact, there is not a report published on this continent prior

¹⁵ 2 Bl. Com. chap. 20.

¹⁶ Story, Eq. Jur. sec. 56.

to 1800 that makes the faintest allusion to the Statute of Uses. And in practical effect the entire subject of uses and trusts in this country owes its importance and elaboration to Mr. Chancellor Kent. Universally the English chancellor's repudiated the theory embodied in the statute of Henry VIII. That statute was from start to finish a rank and glaring piece of class legislation passed in the interests of the aristocracy. It was doomed to utter prostration and failure, and it is exceedingly doubtful if the Stuarts could have retained their throne, entrenched as they were behind that "frenzy of ecstasy" known as the Restoration, had they refused to yield to the suasive eloquence of Nottingham, who had principally devised, or at least germinated, the method by which that odious statute should be best avoided. And yet we are glibly told that the "Statute of Uses" was brought to this country by the colonists as part of our "common law," when it is an undoubted historical fact that the statute had been refined away into absolute nothingness before America was colonized.¹⁷

¹⁷ Would it not be more appropriate to say that *the doctrine of uses*, as known and administered at common law, and as amplified by the equity jurisdiction, was brought to this country by our ancestors? To say that the Statute of Uses, as enacted by the English parliament in the time of Henry VIII., ever became a part of our legal system seems to me clearly erroneous. The colonists only brought with them such parts of the common law "as were applicable to their condition." And to hold that this particular act, passed a full century before they obtained a firm foothold upon our soil, which had been a dead letter upon the statute books for many years, which had been passed originally in the interest of kingcraft and aristocratic pretension, which had become a phantom even in the English law, supplanted by a

more flexible device — to hold, I say, that this statute in *hoc verba* was a thing to be caressed in our nascent jurisprudence is inconceivable. Certainly the Puritans huddled around Plymouth Rock had no affection for it. Its title alone would have condemned it in their estimation. Certainly the Dutch at New Amsterdam never heard of it. Nor had the Swedes on the Delaware. And as for the Jamestown colony, it is a violent wrench upon all legal presumption to hold that they had any earthly use for it. As property rights expanded, and civilization became more secure, uses may have received some partial recognition. But by that time the theory of "trusts" was of wide acceptance and the Statute of Uses more useless than ever.

Uses in the United States.—"The extent to which the doctrine of

§ 209. **Peculiar vices of the Statute of Uses.** The old English doctrine of uses, so far as typified in the statute of Henry VIII, was obnoxious in various ways. (1) It rendered conveyances more complex, verbose, and expensive than was necessary, and perpetuated in deeds the use of a technical language unintelligible as a "mysterious jargon" to all but the members of one learned profession. (2) Limitations intended to take effect at a future day were defeated by a disturbance of the seizin arising from a forfeiture or change of the estate of the person seized to the use. (3) There was great difficulty in determining whether a particular limitation was to take effect as an executed use, as an estate at common law, or as a trust. These objections were so strong and unanswerable that it is a matter of small wonderment that in course of time the statute was entirely discarded. Surely every estate that can be created by a devise ought to be as well created by a grant. Under the New York statutes the conveyance by grant is a substitute for the old conveyance to uses, and future interests in land may be conveyed by grant as well as by devise.¹⁸

uses and the conveyances founded thereon have been introduced into the jurisprudence of this country, cannot be defined with any satisfactory degree of accuracy. In some of the States the Statute of Uses has been recognized as a part of the common law. (*Horton v. Sledge*, 29 Ala. 478; *Rollins v. Riley*, 44 N. H. 11; *Bryan v. Bradley*, 16 Conn. 483; *Marshall v. Fisk*, 6 Mass. 31; *Richardson v. Stodder*, 100 Id. 528; *Nightingale v. Hidden*, 7 R. I. 115; *Adams v. Guerard*, 29 Ga. 651; *Hutchins v. Heywood*, 50 N. H. 491.) And in others similar statutes have been enacted. (Ill. Stats. 1883, chap. 30, sec. 3; Me. Rev. Stats. 1879, sec. 3938; S. C. Gen. Stats. 1882, secs. 1958-1960.) In Virginia the statute only executes the seizin to the use in the case of

deeds of bargain and sale, of lease and release, and covenants to stand seized to use. It does not, like the English statute, include every case where any person may stand or be seized to the use of any other person. (*Lomax's Digest, Laws of Real Prop.* vol. 1, 188. See in Wisconsin *Richl v. Bingenheimer*, 28 Wis. 84; Rev. Stats. 1878, chap. 96, 618. In Michigan, *Ready v. Kearsley*, 14 Mich. 228.) But in several of the States it has never been recognized, while in others it has been expressly determined not to form a part of the common law. (*Thompson v. Gibson*, 2 Ohio, 439; *Helfenstine v. Garrard*, 7 Id. 270; and see *Sherman v. Dodge*, 28 Vt. 26; *Gorham v. Daniels*, 23 Id. 600.)' (*Martindale on Conveyancing*, 117.)

¹⁸ *Vide* Kent's Com. 337.

§ 210. **Distinction between "uses" and "trusts."** What is signified by the two words "use" and "trust" is really much the same thing regarded from two different points of view. A "use" regards principally the beneficial interest; a "trust" regards principally the nominal ownership." Whatever the distinction may have been under the English law, as it interpreted the famous statute of Henry VIII, certain it is, that in our jurisprudence there is disclosed a constant tendency to consider the use as merged in the trust accompanying it which is always its inseparable incident. Both law and equity deal with the trust estate, or rather with the legal estate held by the trustee. This is the foundation upon which the entire superstructure is reared, and in applying the avails of this legal estate to the use of the beneficiary, the court acts directly upon the trust itself through its representative, the trustee. Mr. Perry, in his elaborate and scholarly treatment of the subject, apparently adopts this view, as his entire discussion affects more particularly the trust estate, and the word use entirely disappears even from the title of his work. I am far from ignoring the term "use," but simply wish to italicize the fact that the word "trust," as used in the law of equitable estates, is of overshadowing importance.

Uses and trusts are in their origin of a nature very similar, or rather exactly the same; answering more to the *fidei-commissum* than the *usus-fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance.¹⁹

The distinction that it is attempted to preserve merely relates to the fixed or transitory nature of the estate created. For instance, if a religious corporation becomes possessed in perpetuity of the rents and profits arising from certain lands, the character of the estate, from which these profits were derived, took the form of a use so far as the corporation was concerned. If, on the other hand, the same corporation had a right to the same profits for the term say of twenty years, the character of the estate from which those profits were derived assumed the attributes of a trust estate. It will be readily seen from this illustration, that the force of our previous remark is fully sustained, and there is no practical dis-

¹⁹ Abbott's Law Dict. tit. Use.

²⁰ 2 Bl. Com. chap. 20.

tion between the two, or, rather, uses have been drowned in trusts; one has engulfed the other, or so blended with it that the original line of cleavage is becoming very obscure.

It is a case of distinction without a difference. While in rigid, technical precision a use and a trust may be separated, and each distinct term may convey to the mind a tolerably distinct impression; still in their practical applications, uses and trusts may be regarded as synonymous terms, and import such interests as are alone cognizable by the equity jurisdiction. Mr. Perry, in his incomparable treatise on trusts, admirably summarizes the present situation, so far as regards the distinction between the two when he says "that our present trusts are almost identical with the old uses."²¹

In the case of *Ware v. Richardson*, 3 Md. 505, the court say that by the provisions of this statute "the use was transferred into possession by converting the estate or interest of the *cestui que use* into a legal estate, and by destroying the intermediate estate of the feoffee. The strict construction which was given to this statute by the judges of its time, and the inconvenience and injustice which thereby followed, led, after a lapse of time, through the interposition of a court of chancery, and the ingenuity and learning of lawyers, to the establishment of a regular and enlightened system of trusts. In regard to this revival of the equity jurisdiction in respect to trusts, Lord Mansfield has said in *Burgess v. Wheate*, 1 W. Bl. 123, 'that it has not only remedied the mischiefs of uses so much complained of, but has given occasion to raise up a system of equity, noble, rational, and uniform, in place of a system at once unjust and inconvenient. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII meant to avoid.' "

The same distinguished chancellor, in a subsequent case, said that "it was the absurd narrowness of the courts of law resting on literal distinctions, which in a manner repealed the Statute of Uses, and drove *cestuis que trust* into equity."²² It thus conclusively appears that before Lord Mansfield's time the Statute of Uses had been virtually ignored by the action

²¹ Perry on Trusts, sec. 8, citing *Penny v. Allen*, 7 DeG. M. & G. 422.

²² 2 Dong. 274.

of the equity jurisdiction, and what had formerly been a use before the statute of Henry VIII, was then recognized and administered as a trust pure and simple. Lord Chancellor Sugden says there is not another instance in the books in which the clear intent of a parliamentary enactment has been so systematically ignored. And yet we are told the "Statute of Uses" was "quite generally adopted in this country," when it had been entirely refined away in England before the year 1700! We are always open to conviction, and are afflictively conscious of our liability to error. In view of all the facts, however, we may be pardoned if we obtrude a doubt as to the correctness of this statement, and leave the question for common law pundits to squabble over, secure in the conviction that whatever the result, students in the law of real property will be neither edified nor fructified by the solution of the problem. Our equity jurisprudence knows nothing of the "Statute of Uses." Its force and effect had been completely annihilated a hundred years before we had an equity court, and if "it was brought here with other incidents of the common law," we will let the common law professors tell us what became of it.

§ 211. The New York system examined. The New York revision of 1830 as we have seen, abolished uses and trusts as previously administered, and vastly simplified the entire system of trust estates by an enactment of singular brevity and excellence. Probably no great reform in legal methods has ever been undertaken in this country that elicited more opposition and virulent attack than this. It was confidently predicted that such radical innovations upon the English chancery system, then generally in vogue, would result in the utter prostration of a magnificent equitable conception, lead to inextricable confusion, and to the practical denial of justice to a large class of meritorious litigants. The common law pundits were found in the van of this attack, and, to a man, were firmly convinced of the "calamitous effects" of this "jobbery." It is quite usual for men nourished on theorizing to overrun with ideas — all more or less idiotic — and to attempt the instruction of such juristic Titans as Kent, Livingston, and Walworth. People who are monomaniacs

on the subject of their own importance, are in a perpetual quarrel with all who refuse to recognize their claims. In the face of all this brainless chatter, the great reform was duly inaugurated, and given strength and entablature by the ablest jurists of modern times. By the provisions of the act, trusts are regarded as either express or implied, and no known formula of logic can ever make them anything else. Wherever the trust is expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, is held absolutely void. It abolished passive trusts, where the trustee has only a naked and formal title, and the whole beneficial interest or right in equity to the possession and profits of land is vested in the person for whose benefit the trust was created.²³ The statute further declares that the person so entitled in interest shall be deemed to have a legal estate therein, of the same quality and duration and subject to the same conditions, as his beneficial interest. If any such passive trust be created by any disposition of lands by deeds or devise, no estate or interest whatever vests in the trustee. This provision is founded in sound policy. The revisers have justly observed that the separation of the legal and equitable estates in every such case, appears to answer no good purpose, and it tends to mislead the public and obscure titles, and facilitate fraud.²⁴ The conviction was abroad that the knife must be put to the ulcer, and this huge excrescence fostered and developed through three centuries of nursing, and which had literally eaten the heart out of both law and equity, must be lopped off. The provisions were intended, as stated by the revisors themselves, to "sweep away an immense mass of useless refinements and distinctions, relieve the law of real property, to a great extent, from its abstruseness and uncertainty, and render it, as a system, intelligible and consistent; that the security of creditors and purchasers will be increased, the investigation of titles much facilitated, the means of alienation be rendered far more simple and less expensive and, finally, that numerous sources of vexatious litigation will be

²³ See *Voorhees v. Presbyterian Church at Amsterdam*, 17 Barb. 103.

²⁴ See 4 Kent, 349 *et seq.*

perpetually closed." That these objects have been accomplished is undeniable. And it is very doubtful if any mere legislative enactment has ever been subjected to more pitiless criticism or savage attack. The briefest consideration of the facts will abundantly warrant this assertion. The city of New York, as the financial center of the western world, represents to-day hundreds of millions of dollars of property held in trust. It is along the lines of entire conservatism to say that the aggregate trust capital of the entire American Union does not exceed the amount that has been brought under the sway of these trust enactments. For nearly seventy years every conceivable phase of litigation affecting trust properties has been under careful review, and this mighty volume of litigation has been successfully disposed of without wrenching a single principle of equity from its fastenings. The law has abundantly vindicated the wisdom and the sagacity of the great lawyers who drafted its various recitals. And in its simplification of methods alone it is to be regarded as an achievement of monumental importance. There will always be a class of men to whom obscurity and perplexity in legal formulas is very fascinating. To them everything calculated to break down the barriers originally erected by the medieval ecclesiastics to prevent the spread of legal information, and the simplification of legal methods, is a direct menace to their own means of sustenance. They thrive on ignorance, and foam into paroxysms of rage over any reform aimed to correct an abuse in the perpetuation of which their professional success depends. An edifying spectacle, illustrative of this truth, was recently seen in the efforts of the Chicago abstract offices to suppress the Torrens method of land transfers. It is true that innovation is not a synonym for improvement, but in this matter of trust estates, it is submitted that the New York system stands unrivaled and unassailable, and merits wide recognition. In the interests of simplicity and uniformity I append the text of this celebrated revision with the amendments of May 12th, 1896.

ARTICLE III.—USES AND TRUSTS.

- Section 70. Executed uses existing.
71. Certain uses and trusts abolished.
 72. When right to possession creates legal ownership.
 73. Trustees of passive trust not to take.
 74. Grant to one where consideration paid by another.
 75. *Bona fide* purchasers protected.
 76. Purposes for which express trusts may be created.
 77. Certain devises to be deemed powers.
 78. Surplus income of trust property liable to creditors.
 79. When an authorized trust is valid as a power.
 80. Trustee of express trust to have whole estate.
 81. Qualification of last section.
 82. Interest remaining in grantor of express trust.
 83. What trust interest may be aliened.
 84. Transferee of trust property protected.
 85. When trustee may convey trust property.
 86. When trustee may lease trust property.
 87. Notice to beneficiary where trust property is conveyed, mortgaged or leased.
 88. Person paying money to trustee protected.
 89. When estate of trustee ceases.
 90. Termination of trusts for the benefit of creditors.
 91. Trust estate not to descend.
 92. Resignation or removal of trustee and appointment of successor.
 93. Grants and devises of real property for charitable purposes.

Section 70. Executed uses existing.—Every estate which is now held as a use, executed under any former statute of the state, is confirmed as a legal estate.

§ 71. Certain uses and trusts abolished.—Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished; every estate or interest

in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.

§ 72. When right to possession creates legal ownership.— Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

§ 73. Trustee of passive trust not to take.— Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section, nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.

§ 74. Grant to one where consideration paid by another.— A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another.

§ 75. *Bona fide* purchasers protected. — An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust.

§ 76. Purposes for which express trusts may be created. — An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;
2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;
3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;
4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

§ 77. Certain devises to be deemed powers. — A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

§ 78. Surplus income of trust property liable to creditors. — Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.

§ 79. When an authorized trust is valid as a power. — Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if

directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.

§ 80. Trustee of express trust to have whole estate.— Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.

§ 81. Qualification of last section.— The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under him.

§ 82. Interest remaining in grantor of express trust.— Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs.

§ 83. What trust interest may be alienated.— The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder.

§ 84. Transferee of trust property protected.—Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust, and as to subsequent purchasers from the trustee, without notice and for a valuable consideration.

§ 85. When trustee may convey trust property.—If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. The supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that it is for the best interest of such estate, or that it is necessary and for the benefit of the estate, to raise funds for the purpose of preserving and improving it; and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold, if it shall appear to the court to be for the best interest of such estate.

§ 86. When trustee may lease trust property.—A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The supreme court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term. If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the supreme court, on the application of

such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.

§ 87. Notice to beneficiary where trust property is conveyed, mortgaged or leased.— The supreme court shall not grant an order under either of the last two preceding sections, unless it appears to the satisfaction of such court that a written notice, stating the time and place of the application therefor, has been served upon the beneficiary of such trust property, at least eight days before the making thereof, if such beneficiary is an adult within the state; or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such person of such notice as the court, or a justice thereof, prescribes.

§ 88. Person paying money to trustee protected.— A person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid.

§ 89. When estate of trustee ceases.— When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease.

§ 90. Termination of trusts for the benefit of creditors.— Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a different limitation is contained in the instrument creating the trust, or is especially prescribed by law. The estate or interest remaining in the trustee or trustees shall thereon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created.

§ 91. Trust estate not to descend.— On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same,

such trust, if unexecuted, shall vest in the supreme court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct.

§ 92. Resignation or removal of trustee and appointment of successor.—The supreme court has power, subject to the regulations established for the purpose in the general rules of practice:

1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.

2. In an action brought or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.

3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section shall not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee.

§ 93. Grants and devises of real property for charitable purposes.—A conveyance or devise of real property for religious, educational charitable or benevolent uses, which is in other respects valid, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such an instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the supreme court, and such court shall have

control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings.

§ 212. The doctrine of uses and trusts in the United States. Notwithstanding the seething contention that surrounded the entire subject of uses and trusts in the mother country, it was not until the period of the restoration (1660) that the subject reached anything like a bed-rock foundation. The nimble brain and suasive eloquence of Chancellor Nottingham had much to do with the fixity of the doctrine, and the same great chancellor is generally supposed to have drafted the entire scheme of what afterwards became so celebrated as the statute for the prevention of frauds and perjuries. In this country the development of the doctrine was very sluggish until some time after the opening of the present century. Mr. Justice Story doubts if there was any such thing as equity jurisprudence administered in any form on this side of the Atlantic until some time after the opening of the present century except in a crude and unsatisfactory way, that only resulted in great discontent to both the litigating parties. Certain it is that the New York Court of Chancery first gave impulse and direction to the equity jurisprudence of America, and in the thirty-two volumes comprehending the decisions of this famous court, we find the germ of what is now distinctively known as the American Equity System. Under such chancellors as Kent, Livingston, Lansing, Walworth, McCoun, Hoffman, Sandford, Van Vleet, Whittlessey and their compeers, much has been accomplished towards giving symmetry and stability to the present system of uses and trusts. Their efforts have been supplemented by a series of eminent jurists who have adorned the New Jersey Equity bench, and the reports of that tribunal are justly regarded as permanent repositories of many valuable contributions to this intricate branch of our jurisprudence.

§ 213. What is a trust? A trust, in its original and most enlarged sense, may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership, and to constitute which, three circum-

stances must concur. 1, Sufficient words to raise it; 2, A definite subject; and, 3, A certain or ascertained object.²⁶

The legal ownership holds the absolute and direct dominion over the property in view of the law; but the income, profits or benefits thereof in his hands, belong wholly or in part to others.²⁸ The legal estate in the property is thus made subservient to certain uses, benefits or charges in favor of others; and the uses, benefits or charges, constitute the trusts which courts of equity will compel the legal owner as trustee to perform, in favor of the *cestui que trust* or beneficiary. A trust is sometimes also called a use, from which it is only technically distinguished.²⁷

This same question "What is a trust?" is asked and answered in the most satisfactory way by Mr. Burrill, who defines it as a confidence, for which the party is without remedy, save in a court of equity."²⁸

An obligation or duty, arising out of confidence.* An obligation upon a person arising out of a confidence reposed in him, to apply property faithfully, and according to such confidence.²⁹

A right or interest, arising out of confidence.* An equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof.³⁰ An equitable right or interest in property, which another holds in confidence as the legal owner.* Both these definitions are essential to make up the complete idea of the word.

* *The radical idea of a trust is confidence, and this is the word employed by Lord Coke in his definition of a use, which has been adopted by Mr. Butler and Mr. Lewin, as the best and most exact definition of a trust.³¹ The same idea is still more aptly expressed by the Roman term *fidei-commissum*, which literally means a thing committed to one's

²⁶ (a) *Craweys v. Colman*, 9 Ves. 323.

²⁶ (b) *Stuart v. Melish*, 2 Atkyns, 612.

²⁷ Willard's Equity Jurisprudence (Potter's ed.), 410.

²⁸ Henley, Lord Keeper, in *Burgess v. Wheate*, 1 W. Bl. 180.

²⁹ Willis on Trustees, chap. 1, 2; *Stair's Inst.* b. 4, tit. 6, sec. 2, cited *ibid.*

³⁰ 2 Story's Eq. Jur. 964.

³¹ Butler's Co. Litt. note 249, lib. 3; Lewin on Trusts, 15; see *infra*.

faith, and Justinian explains that it was so called, because it rested upon no obligation of law, *nullo vinculo juris*, but only on the honor of those to whom it was committed, *sed tantum pudore eorum qui rogabantur, continebantur*.³²

A trust, then, in its simplest elements, is a confidence reposed in one person, who is termed the trustee, for the benefit of another, who is called the *cestui que trust*; and it is a confidence respecting property, which is thus held by the former for the benefit of the latter. Out of this confidence arise two estates in the property which is the subject of it; a legal estate in the trustee, which consists essentially in obligation; and an equitable estate in the *cestui que trust*, which consists in right and beneficial enjoyment. So that a trust embraces the two ideas of an obligation on the part of one person and a corresponding right on the part of another, which are presented in the definitions above given; both founded upon, and growing out of the radical idea of confidence, which has been already explained.

In a trust thus constituted, the legal owner holds the direct and absolute dominion over the property, in the view of the law; but the income, profits or benefits thereof in his hands belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits or charges in favor of others; and these uses, benefits or charges, constitute the trusts which courts of equity will compel the legal owner, as trustee, to perform, in favor of the *cestui que trust*, or beneficiary.³³

Mr. Cruise defines a trust or trust estate to be "a right in equity to take the rents and profits of lands whereof the legal estate is vested in some other person; to compel the person thus seized of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct, and to defend the title to the land. "In the meantime, the *cestui que trust*, when in possession, is considered, in a court of law, as tenant at will to the trustee.³⁴ Chancellor Kent expresses the same idea, in more comprehensive terms: "A

³² Inst. 2, 23, 1.

³³ 2 Story's Eq. Jur. sec. 964.

³⁴ Cruise's Dig. tit. xii, chap. 1, sec. 3.

trust, in the general and enlarged sense, is a right on the part of the *cestui que trust* to receive the profits and to dispose of the lands in equity.”³⁵

In its simplest form it is a relation between two persons, by virtue of which one of them (the trustee) holds property for the benefit of the other (the *cestui qui trust*), while as regards the rest of the world he, the trustee, is for most purposes, absolute owner of it. They arise either by act of the party or by operation of law.³⁶ No technical language is necessary to the creation of a trust. If it appears to be the intention of the parties to an instrument conveying property that it is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. In each case the intention is to be gathered from the general purpose and scope of the instrument.³⁷ It will be seen how closely we parallel the former definition of a “use” when we come to define a trust.³⁸

³⁵ 4 Kent's Com. 304; 2 Burrill's Law Dict. tit. “Trust.”

³⁶ Rapalje & Lawrence's Law Dict;

³⁷ Colton v. Colton, 127 U. S. 310. Creswell v. Jones, 68 Ala. 423.

³⁸ A trust is where property is conferred upon and accepted by one person on the terms of holding, using or disposing of it for the benefit of another. Wherever such a trust is shown it is cognizable by a court of equity. The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the court of morals or the forum of conscience is no trust at all; it is an absurdity. The law does not acknowledge a trust over the exercise of which it will not through its tribunals assume control to avert its destruction, perversion or abuse. (*Morice v. Bishop of Durham*, 9 Ves. Jr. 400.)

Trusts are the mere creatures of confidence between party and party, totally distinct in almost every quality from those legal estates which are the subjects of tenure. They are in their nature independent of tenure, and, therefore, not the objects of those laws which are founded in the nature of tenure. They are rights arising solely out of the intent of the party who created them, and, therefore, such intent could be the only guide in the execution of them. (*Green v. Green*, 23 Wall. [90 U. S.] 486.)

The rule in *Shelley's* case is applicable to trust estates, where both the life estate and the remainder are of the same character; but not where the life estate is an equitable character, and the remainder is a legal estate, or *vice versa*. (*Green v. Green*, 23 Wall. 486.) The rule is not one of construction, but of law

§ 214. **How created.** Our present statutes require that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust;³⁹ but it need not be done in the form of a grant. A declaration of trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and the *cestui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other.⁴⁰

The Statute of Frauds, as has been repeatedly stated, is universally accepted in this country although there is some variation in details, as will be found by a careful comparison of the various enactments. By the terms of this statute all declarations of trust or confidence, affecting lands, tenements and hereditaments, should be evidenced in writing. Of course, it is not to be assumed that trusts raised by operation of law fall within the terms of this statute. The exemption thus includes all grades of involuntary or implied trusts. Nor does it include such declarations of trust as are made with reference to personal property. But where it would work a fraud, and permit an unconscionable advantage, the court will not allow the statute to act as a screen.⁴¹

No precise form of words is necessary to create a conveyance to uses. It is sufficient if the intention to create one is

instituted as a support and prop to feudal tenures.

In many of the leading States the entire subject of trusts has been brought within the limits of statutory regulation. Under the New York law neither real nor personal property can be kept from absolute ownership, except during two designated lives in being. (Garvey v. McDevitt, 72 N. Y. 556; Hobson v. Hale, 95 N. Y. 588.) And these rules are not relaxed for charity. (See the celebrated case of Holland v. Alcock, 108 N. Y. 312.) The capacity to take is to be determined

at the time of the testator's death. (White v. Howard, 46 N. Y. 144.) A period measured by years instead of by lives in being, during which there will be no persons in existence by whom an absolute estate in possession can be conveyed, brings the estate within the rule against unlawful suspension of alienation. (Cruikshank v. Home for the Friendless, 113 N. Y. 337; 18 Abb. N. C. [N. Y.] 282.)

³⁹ Cook v. Barr, 44 N. Y. 158.

⁴⁰ Wright v. Douglass, 52 Pa. St. 527.

⁴¹ Foote v. Foote, 58 Barb. 258.

clearly indicated, although the words "use, confidence or trust" are not used. A conveyance of land may always be construed to be that kind or species of conveyance which may be necessary to vest the title according to the intention of the parties, if such interpretation is not repugnant to the terms of the grant.⁴²

Doubts were at one time entertained whether trusts could be created by parol, but it is well established that this could be done at common law, both as to real and personal property. "A trust in reality, like a use, was in technical language 'averable,' that is, could be created by word of mouth. The better opinion is, however, that this is only true of those cases in which the legal estate could be created by feoffment, where of course no writing was necessary. But, where a deed was requisite for the conveyance of the legal estate, as in the covenant to stand seized to uses, these uses and trusts were not averable, but could be treated only in the same manner as legal estates."⁴³ Trusts and uses were raised in the same manner, and if a feoffment was made without consideration, a use resulted to the feoffor, unless the use or trust was declared at the time of the conveyance. Now, it must be observed that no consideration was necessary to a feoffment. The conveyance itself raised the use, and separated it from the legal estate. The use so raised would, however, as we have said, in the absence of a consideration, result to the feoffor unless declared at the time of the feoffment, and this declaration might be voluntarily made by parol, either in favor of the feoffee or of a third person. But there was a great difference in this respect between a conveyance which operated by transmuting the possession and the covenant to stand seized, which had no operation but by the creation of a new use; and as this use was raised by equity, and equity never acts without a consideration, a consideration was always necessary to the transfer of the interest by this conveyance, whereas in the case of a feoffment or fine, the use arises upon the conveyance itself.

* * * It seems, therefore, that at common law only the

⁴² *Marshall v. Fisk*, 6 Mass. 24, 32;
2 Washb. Real. Prop. 146.

⁴³ 43 Bispham, Eq. 95; Hill, Trusts, 86; Gilbert, Uses and Trusts, 270.

solemn conveyance, by livery or record, could raise the use by its own virtue, and dispense with the deed for declaring it, as well as the consideration for raising it."⁴⁴ It appears then, that at common law no use or trust could be raised in lands without a consideration, except in the single instance of a conveyance operated by transmutation of possession, the character of the conveyance alone being sufficient to raise the use, and to dispense with the necessity for a consideration. This view is distinctly approved in *Wood v. Cherry*, 73 N. C. 110, where it is said by Pearson, Ch. J., that "a trust can only be created in one of four modes: 1, By transmission of the legal estate, when a simple declaration will raise the use or trust; 2, A contract based upon valuable consideration to stand seized to the use or in trust for another; 3, A covenant to stand seized to the use of or in trust for another, upon good consideration; 4, when the court, by its decrees, converts a party into a trustee, on the ground of a fraud."⁴⁵

A trust of personalty is not within the Statute of Uses and Trusts, and may be created for any lawful purpose.⁴⁶ But such trusts are within the statute forbidding accumulations, except for minors.⁴⁷

Any agreement or contract in writing, whereby a person agrees that a particular parcel of land shall be dealt with in a particular manner for the benefit of another, raises a trust in favor of such other person.⁴⁸

The trust may be manifested or proven by any writing in

⁴⁴ Roberts, Fr. 92.

⁴⁵ See also *Frey v. Ramsour*, 66 N. C. 466; *Shields v. Whitaker*, 82 Id. 516; *Malone*, Real Prop. Trials, 487.

⁴⁶ *Gilman v. McArdle*, 99 N. Y. 451; *Holmes v. Mead*, 52 Id. 332.

⁴⁷ *Pray v. Hegeman*, 92 N. Y. 508.

⁴⁸ *Conway v. Kinsworthy*, 21 Ark. 9; *Price v. Reeves*, 38 Cal. 457; *Rabun v. Rabun*, 15 La. Ann. 471; *Baylies v. Payson*, 5 Allen (Mass), 488; *Pingree v. Coffin*, 12 Gray

(Mass), 288; *Giddings v. Palmer*, 107 Mass. 270; *Homer v. Homer*, 107 Id. 82; *Price v. Minot*, Id. 61; *Paul v. Fulton*, 25 Miss. 156; *Wadding v. Loker*, 44 Mo. 132; *Currie v. White*, 45 N. Y. 882; *Reed v. Lukens*, 44 Pa. 200; *Cressman's App.* 42 Pa. 147; *Rees v. Livingston*, 41 Id. 113; *Pownal v. Taylor*, 10 Leigh. 183; *Seymore v. Freer*, 75 U. S. (8 Wall.) 202, 19 L. ed. 306; *Legard v. Hodges*, 1 Ves. Jr. 478.

which the fiduciary relation between the parties and its terms can be clearly read.⁴⁹

a. *Statutory regulations in California—Nature and creation of a trust.* Sec. 2215. *Trusts classified.* A trust is either:

1. Voluntary; or,
2. Involuntary.

Sec. 2216. *Voluntary trusts, what.* A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.

Sec. 2217. *Involuntary trust, what.* An involuntary trust is one which is created by operation of law.

Sec. 2218. *Parties to the contract.* The person whose confidence creates a trust is called the trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary.

Sec. 2219. *What constitutes one a trustee.* Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

Sec. 2220. *For what purpose a trust may be created.* A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the Titles on Uses and Trusts and on Transfers.

Sec. 2221. *Voluntary trust, how created as to trustor.* A voluntary trust is created, as to the trustor and beneficiary, by

⁴⁹ Bragg v. Paulk, 42 Me. 502; Portland Second Unitarian Soc. v. Woodbury, 14 Id. 281; Maccubbin v. Cromwell, 7 Gill & J. 157; Orleans v. Chatham, 2 Pick. (Mass), 29; Gomez v. Tradesman's Bank, 4 Sandf. (N. Y.), 106; Raybold v. Raybold, 20 Pa. 308; Steere v.

Steere, 5 Johns. Ch. (N. Y.), 1, L. ed. 987; Cuyler v. Bradt, 2 Cal. Cas. 326; Graham v. Lambert, 5 Humph. (Tenn.) 595; Barron v. Barron, 24 Vt. 375; Fisher v. Fields, 10 Johns. (N. Y.), 495; Buck v. Swazy, 35 Me. 41; Chamberlain v. Thompson, 10 Conn. 243.

any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust, and,

2. The subject, purpose, and beneficiary of the trust. (58 Cal. 483.)

Sec. 2222. *How created as to trustee.* Subject to the provisions of section 852, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,

2. The subject, purpose, and beneficiary of the trust.

Sec. 2223. *Involuntary trustee, who is.* One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

Sec. 2224. *Involuntary trust resulting from negligence, etc.* One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.⁵⁰

b. *By precatory expressions.* Precatory words are merely words of recommendation usually incorporated in a will and designed to express the testator's wishes in reference to some disposition of his property. Courts of equity have gone great lengths in creation of implied or constructive trusts from such words. The tendency is to discourage the extension of the doctrine. Whenever the object or the property of the supposed trust is not certain or definite, or a clear discretion and choice to act is given and whenever prior dispositions import uncontrollable ownership, the courts will not create a trust from precatory words.⁵¹ We see no sufficient ground for calling in question the wisdom or policy or the rule of construction uniformly applied to wills in the courts of England and in most of the United States, that words of entreaty, recommendation, or wish, addressed

⁵⁰ 58 Cal. 116, 621; Cal. Civ. Code, secs. 2215-2224.

⁵¹ 2 Story's Eq. sec. 1086.

by a testator to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of trust, and the subject matter on which it is to attach or from which it is to arise and be administered. The criticism which has been sometimes applied to this rule by text-writers, and in judicial opinions, will be found to rest mainly on its application in particular cases and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only when the creation of a trust will clearly subserve that intent.

It may sometimes be difficult to gather that intent and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of the devisee or legatee, and with what it may be supposed a testator would do if he could control his action. But difficulties of this nature which are inherent in the subject matter, can always be overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relation and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and above all if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee, the just and reasonable interpretation is, that a trust is created, which is obligatory and can be enforced in equity as against the trus-

tee, by those in whose behalf the beneficial use of the gift was intended.⁵²

If there be a trust sufficiently expressed and capable of enforcement, it does not disparage, much less defeat it, to call it "precatory." The question of its existence depends, after all, upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel or advice, intended only to influence, and not to take away the discretion of the legatee growing out of the right to use and dispose of the property given as his own. On the other hand, the language may be imperative in fact, though not in form, conveying the intention of the testator in words equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to defeat and limit the extent of the interest conferred upon his beneficiary.⁵³

In an ordinary deed the word "heirs," for instance, is necessary to convey a fee simple. But it is not so in an instrument creating a trust, whether it be a deed or a will.⁵⁴ Where a power of sale is given to a trustee, it necessarily conveys a fee.⁵⁵ If the purposes of the trust require that the trustee take an estate in fee simple, such effect will be given to the deed or devise, although there are no words of inheritance.

Two rules of construction have been settled: "First, When-

⁵² Bigelow, Ch. J., in *Warner v. Bates*, 98 Mass. 274; and see in further illustration *Handley v. Wrightson*, 60 Md. 198; *Coates' App.* 2 Barr. 129; *Van Amee v. Jackson*, 35 Vt. 173; *Knox v. Knox*, 59 Wis. 172; *Erickson v. Willard*, 1 N. H. 217; *Homer v. Sheldon*, 2 Met. (Mass.), 194; *Hess v. Singler*, 114 Mass. 56; 1 Jarman on Wills, 333; 1 Red. on Wills, sec. 17, cl. II. sec. 43.

⁵³ *Colton v. Colton*, 127 U. S. 312, *Matthews, J.*; see *Perry on Trusts*, secs. 112-23.

⁵⁴ *Fisher v. Fields*, 10 Johns. (N.Y.) 495; *Neilson v. Lagow*, 12 How. 98; *Chamberlain v. Thompson*, 10 Conn. 243; *Cleveland v. Hallett*, 6 Cush. 403; *Preachers' Aid Society v. England*, 106 Ill. 125; *Ivory v. Burns*, 56 Pa. St. 300.

⁵⁵ *Spessard v. Rohrer*, 9 Gill, 261.

ever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not.⁵⁶ Second, Although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust requires."⁵⁷

Although recommendatory words are used by a testator which of themselves seem to leave the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that "he hopes," "recommends," "has a confidence," wish or desire that the devisee shall do certain things for the benefit of another person; yet courts of equity have construed such precatory expressions as creating a trust.⁵⁸ But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach, is not sufficiently defined."

c. *Great caution in accepting precatory trusts.* Redfield on Wills, vol. 2, p. 416, in quoting the language of Lord Cranworth, V. C., in *Williams v. Williams*, 1 Sim. (N. S.), 358, says that "the real question in these cases always is, whether the wish or desire or recommendation that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." To the same effect are the cases *Gilbert v. Chapin*, 19 Conn. 342; *Pennock's Estate*, 20 Pa. St. 268. In the last case it was held, that expressions of desire, etc., in a will were not *prima facie* suffi-

⁵⁶ *Oates v. Cook*, 3 Burr. 1684; *Stearns v. Palmer*, 10 Met. 32; *Deering v. Adams*, 37 Me. 265; *Baptist Society v. Hail*, 8 R. I. 234; *Nelson v. Davis*, 35 Ind. 474.

⁵⁷ Quoted by Perry, sec. 312; *Barker v. Greenwood*, 4 M. & W. 421, 429; *Warter v. Hutchinson*, 1 B. & C. 721; *Koenig's App.* 57 Pa. St. 352; *West v. Fitz*, 109 Ill. 425;

Wilcox v. Wheeler, 47 N. H. 488; *Ellis v. Fisher*, 3 Sneed, 231.

⁵⁸ 18 Ves. 41; 8 Id. 380; Bac. Ab. Legacies.

⁵⁹ 1 Bro. C. C. 142; 1 Sim. 542, 556; see 2 Story's Eq. Jur. sec. 1070; *Lewin on Trusts*, 77; 4 Bouv. Inst. n. 3953; 2 Bouvier's Law Dict. 364.

cient to convert a devise or bequest into a trust, and that the Roman and English rule on the subject did not prevail in that State, and only amounts to a declaration of trust, where it appeared from other parts of the will, that the testator did not intend to commit the estate to the devisee or legatee, or its ultimate disposal to his discretion. The principle clearly deducible from these authorities, and numerous others that might be cited, establish the doctrine that precatory words will not create a trust, where, either by a consideration of all of the provisions of the will, or by express words of the testator, it appears that the recommendation was not intended to be obligatory.

Precatory words in the creation of trusts. It may be stated as a general result of the cases in regard to the effect of words expressive of wishes of a testator, not imperative in form, that whether the words of the will are those of recommendation or precatory, or expressing hope, or that the testator has no doubt, if the objects with regard to whom such terms are applied are certain, and the subjects of property to be given are also certain, the words are considered imperative and create a trust.⁶⁰

It is true a tendency has been manifested by some courts to restrict the application of this general rule, or to qualify it, and even, as in Pennock's case, *supra*, to reject it altogether and to adopt as more reasonable the presumption, that words precatory in form are meant to imply discretion in the donee, and should be so construed, unless clearly shown to be used in an imperative sense from other parts of the will; but we consider the weight of authority to be for upholding words of request, desire, expectation, and the like, as creative of trusts, when the contrary does not appear from the context or by necessary implication.⁶¹

Courts of equity have gone great lengths in creating implied or constructive trusts from such words. The tendency is to discourage extending the doctrine. Whenever the object or the property of the supposed trust is not certain or definite, or a clear discretion and choice to act is given, and

⁶⁰ 1 Jarm. on Wills (Rand. & Talc. ed.) 60; 2 Story's Eq. Jur. sec. 1068.

⁶¹ Rice, Prob. Law, 536.

whenever prior dispositions import uncontrollable ownership, the courts will not create a trust from precatory words.

The rule laid down by Lord Cranworth, in *Williams v. Williams*, 1 Sim. (N. S.), 358, and approved in *Wood v. Seward*, 4 Redf. 271, and by the New York Court of Appeals in *Foose v. Whitmore*, 82 N. Y. 405, is as follows: "The real question always is, whether the wish, or desire, or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion."⁶²

The existing state of the law on this subject, as received in England, and generally followed in the courts of the several States of this Union, is well stated by Gray, Ch. J., in *Hess v. Singler*, 114 Mass. 56, 59, as follows: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases in this, and in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence."

In the previous case of *Warner v. Bates*, 98 Mass. 274, 277, Chief Justice Bigelow vindicated the soundness and the value of this rule in the following commentary: He said: "The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to

⁶² See Rice, Prob. Law, 536.

involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it if care is taken to keep it in subordination to the primary and cardinal rule, that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying to all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee, the just and reasonable interpretation is that a trust is created which is obligatory and can be enforced in equity against the trustee by those in whose behalf the beneficial use of the gift was intended."

§ 215. **For what purposes created.** Trusts are generally created for any or either of the following purposes: 1, To sell lands for the benefit of creditors; 2, to sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3, To receive the rents and profits of lands and apply them to the use of any person, during the life of such person, or for any shorter term, sub-

ject to the rules prescribed for the creation, etc., of legal estates; 4, To receive the rents and profits of lands, and to accumulate the same, for the benefit of minors then in being and during their minority. A devise of lands to executors or other trustees to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, vests no estate in the trustee, but the trust is valid as a power. Where an express trust is created for any purpose other than those above enumerated, no estate vests in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust. The absolute power of alienation cannot be suspended for a longer period than two lives in being at the time of the creation of the trust.

§ 216. **Parties to a trust.** The person whose confidence creates a trust is called a trustor. The person in whom the confidence is reposed is called the trustee, and the person for whose benefit the trust is created is called the beneficiary. Generally it may be said that a trust may be created for any purpose for which a contract can be made that would be recognized in law and, so far as regards the trustor and beneficiary, a trust arises wherever there are sufficient words or acts, that indicate with reasonable certainty, an intention on the part of the former to create a trust, and there is equal certainty as to the subject, purpose and beneficiary of that trust.⁶³ All persons *sui juris* and capable of holding property may be trustees.⁶⁴

A near relative may be appointed, but such appointments are in general objectionable.⁶⁵ A nun may be a trustee,⁶⁶ or a bankrupt.⁶⁷ The fact that the proposed trustee resides abroad is of course objectionable.⁶⁸ A witness to a will may be a trustee under it.⁶⁹ Married women, if of age, may be

⁶³ Cal. Civ. Code, secs. 2218-2221.

⁶⁴ *Canmeyer v. United Churches*,

2 Sandf. Ch. 186; *Pickering v. Shotwell*, 10 Pa. St. 27.

⁶⁵ *Wilding v. Bolder*, 21 Beav. 222.

⁶⁶ *Smith v. Young*, 5 Gill, 197.

⁶⁷ *Shyrock v. Waggoner*, 33 Pa. St. 430.

⁶⁸ *Meinertzhagen v. Davis*, 1 Coll. 335.

⁶⁹ *Hogan v. Wyman*, 2 Ore. 302.

trustees," and they may be such independently of any statute.⁷¹ Infants may be trustees by devolution or necessity.

In modern times corporations are often authorized by their charters to act in this capacity, and they often do so act. In *Vidal v. Girard's Executors*, 2 How. 127, it was held that a city could be a trustee for a charitable institution. But a corporation cannot be a trustee for any object foreign to the purposes for which it was created.⁷² Some companies are formed for the special purpose of administering trusts, *i. e.*, holding and managing property for the use and benefit of a beneficiary.⁷³

Mass. Pub. Stats. ch. 147, sec. 5.

⁷¹ 1 Perry on Trusts, secs. 48-51; *People v. Webster*, 10 Wend. 554.

⁷² *Jackson v. Hartwell*, 8 Johns. 422; see generally *Green v. Rutherford*, 1 Ves. Sen. 462; *Trustees of Phillips Academy v. King*, 12 Mass. 546; *The Dublin Case*, 38 N. H. 459, 587; *First Congregational Society v. Atwater*, 23 Conn. 34.

⁷³ Professor Walker states the law with his usual precision and brevity:

"All persons may convey land in trust who are capable of making a deed or will.

"All persons may be made trustees, not excepting infants or married women; because the mere capacity of being a trustee involves nothing more than the capacity of receiving a legal conveyance. It is obvious, indeed, that there may be certain acts required in the execution of a trust to which persons under disability would not be legally competent in their own right. But in such cases the power conferred by the grantor gives the trustee a capacity which the law does not give; for example, in the execution of a trust an infant, or a mar-

ried woman without her husband, may make a valid conveyance.

"All persons without exception may be beneficiaries; since no disability whatever can disqualify one for enjoying the benefit of a trust properly created.

"Every description of property, real or personal, is capable of being settled in trust; there being no valuable thing which one man may not hold for the benefit of another." (*Walker's Am. Law*, 371.)

(a) *Corporation as trustees.*—In *Philadelphia v. Fox* (64 Pa. St. 169 [1870]), the constitutionality of the act of June 30, 1869, depriving the city of Philadelphia of the power to administer the trusts under the wills of Mr. Girard and others, and vesting the powers of the city in this respect in an independent and separate board, not appointed by the city, was sustained. In giving the judgment of the court Mr. Justice Sharswood, in the course of his interesting and learned opinion, remarks:

"A municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but only, as it seems, for public purposes, germane to its ob-

§ 217. Trustees—their duties and liabilities. The word “trustee” of itself means trustee for some one whose name is not disclosed.”

jects. (*Philadelphia v. Elliott*, 3 Rawle [Pa.], 170; *Cresson's Appeal*, 6 Casey [30 Pa. St.], 437; *Vidal v. Philadelphia*, 2 How. 127.) I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. (*Gloucester v. Osborn*, 1 H. of Lords Cases, 285.) But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the city of Philadelphia, which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues; planting them with ornamental and shade trees; the education of orphans; the building of school-houses; the assistance and encouragement of young mechanics; rewarding ingenuity in the

useful arts; the establishment and support of hospitals; the distribution of soup, bread or fuel to the necessitous, are objects within the general scope and purpose of the municipality.

“This whole question is put at rest, and that as to one of the most important of these trusts and as to its trustees, by the opinion of the Supreme Court of the United States in *Girard v. Philadelphia*, 7 Wall. 14. ‘It cannot admit of a doubt,’ says Mr. Justice Grier, ‘that where there is a valid devise to a corporation, in trust for charitable purposes unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator if the corporation be dissolved, or, if not, by modifying or enlarging its franchises, provided the trust be not perverted, and no wrong done to the beneficiaries. Where the trustee is a corporation, no modification of its franchises or change in its name, while its identity remains, can affect its right to hold property devised to it for any purpose.’”

In *Vidal v. Girard's Executors*, 2 How. 127 (1844), the court lays down this rule: “Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repug-

¹⁴ *Shaw v. Spencer*, 100 Mass. 389.

In one sense a mere bailee or agent is a trustee, because he has property delivered to him in the confidence that he will do with it according as he is directed by the bailor. It may

nant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But it will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." (Reaffirmed, *Perin v. Carey*, 24 How. 465 [1860]; *Girard v. Philadelphia*, 7 Wall. 1 [1868]).

(b) *Who may be cestui que trust?* — The answer is, any one. (*Barrow v. Wadkin*, 24 Beav. 1; *Nightingale v. Goulburn*, 5 Hare, 484.) A State may be a *cestui que trust*. (*Neilson v. Lagow*, 12 How. 107.) There is a general rule that one incompetent to take the title to property cannot be a *cestui que trust* as to such property. Thus it was held that a free negro, prohibited by law from owning slaves, could not be the *cestui* of slaves. (*Dunlop v. Harrison*, 14 Grat. 251; see *Perry on Trusts*, secs. 60-65.) That an alien enemy cannot be a *cestui que trust* was decided in *Bardwell v. Weeks*, 13 Johns. 1, overruling Chancellor Kent's decision reported in 1 Johns. Ch. 206. And all property, real or personal, which can be sold or assigned at law, may be the subject of a trust. (*Morison v. Moat*, 9 Hare, 241; *Robinson v. Mauldin*, 11 Ala. 977; *Merwin on Equity*, 85.)

(c) *Quantity of interest held by trustee.* — In *Sears v. Russell*, 8

Gray, 86, the court said: "The rule is well settled that trustees will be held to take that quantity of interest in estates devised to them which the exigencies of the trust may demand; * * * and the legal estate vested in them must be commensurate with the estate which they are bound to convey. If they are to grant a fee, it is necessary they should have a fee." (*Slade v. Patten*, 68 Me. 380.)

(d) *The beneficiary must be certain.* — The law is settled that a certain designated beneficiary is essential to the creation of a valid trust. The remark of Judge Wright, in *Levy v. Levy*, 33 N. Y. 107, that "if there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust, without a certain beneficiary who can claim its enforcement, is void," has been repeated and reiterated by recent decisions of this court. (*Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 Id. 312, 11 Cent. Rep. 861; *Read v. Williams*, 125 N. Y. 560.) And the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power. The equitable rule that prevailed in English court of chancery known as the "*cy pres* doctrine" and which was applied to uphold gifts for charitable purposes when no beneficiary was

even be required, by statute, that the title to the property be conveyed to the trustee. * * * Conveying property to another in confidence that he will sell it and apply the avails

named, has no place in the jurisprudence of New York. (Holmes v. Mead, 52 N. Y. 332; Holland v. Alcock, *supra*.) If, for instance, the Tilden Trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of the State, or of the United States, but embraces the whole world. Nothing could be more in definite and uncertain, and broader and more unlimited power could not be conferred than to apply the estate to "such charitable, educational and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind." "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man." (Perry, Tr. sec. 637.) "Such power is distinctly in contravention of the policy of the Statute of Wills. It substitutes for a will of the testator the will of the donees of the power and makes the latter controlling in the disposition of the testator's property. That cannot well be said to be a disposition by the will of the testator with which the testator had nothing to do, except to create an authority in another to dispose of the prop-

erty according to the will of the donees of the power." (Read v. William, 125 N. Y. 569.)

(e) *Review of the celebrated Tilden case*—In the case of Tilden v. Green, 130 N. Y. 29; 14 L. R. A. 33, the devise in trust under the thirty-fifth and thirty-ninth items of the will of Samuel J. Tilden was passed upon. Under these items property was devised to trustees to be held for two lives in being, with requests that they procure an act of incorporation, to be known as the "Tilden Trust," with capacity to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects as the trustees might more particularly designate, and authorize them to convey such property to such corporation when formed, or if, from any cause or reason, they should deem it inexpedient to convey to such corporation, then they were directed to apply it to the use of such charitable, educational or scientific purposes as in their judgment would render such property most widely and substantially beneficial to the interests of mankind. It was said in that case: "The devise does not designate any beneficiary, but, on the contrary, leaves it to the discretion of the trustees whether or not they will or will not convey to the corporation. Hence, there is not, and cannot be, any person, natural or artificial, who is, or will become, entitled to the execution of the trust in his favor." The conclusion of the court was

in a particular way, not for his own use, undoubtedly creates a trust.⁷⁵

A trustee is a person in whom some estate interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. When he acts in good faith for the benefit of the trust he is entitled to indemnify himself for his engagements out of the estate in his hands. If he wants to protect himself from individual liability on a contract he must stipulate that he is not to be personally responsible.⁷⁶

"The law requires the personal attention and active intervention of a trustee in the possession, protection, security, collection and management of the estate. He cannot turn the discharge of any of his duties in that behalf over to third persons, except from actual necessity, without making himself liable for their negligence, misconduct and misapplication of any part of the estate, by which a loss results to the estate, and, when an actual necessity arises for the employ-

that the bequest could not be maintained because of the complete discretion vested in the trustees — whether they would give it or not, to the beneficiary suggested. A charter was actually obtained and the property was in fact conveyed by the trustees to the corporation thus created, before the suit was brought, but the court held that the invalidity of the trust could not be cured by anything done by the trustees towards its execution. It is also held in that case that a trust without a beneficiary who can claim its enforcement is void, and this objection is not obviated by the existence in the trustees in a power to select a beneficiary, unless the class of persons in whose

favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power, and when the beneficiary is not designated in the will, such beneficiary cannot be designated by the trustees in pursuance of a discretion vested in them by the will. It is further said: "No trust is enforceable unless there is some person or class of persons, who have a right to a part or all of the designated funds, and can demand its conveyance to them, and in case of refusal can sue the trustees in equity, and compel compliance with demand."

⁷⁵ Anderson's Law Dict.

⁷⁶ Taylor v. Davis, 110 U. S. 334.

ment of another, he is bound to select and use the best accredited agencies, and to use vigilance and prudence in selecting the agency to be used, and make the selection at the time the necessity arises. When he intrusts the discharge of any of these duties to another, in case of a loss arising therefrom, if he would exonerate himself, he takes the burden of showing an existence of an actual necessity for employing such third person, in the matters of the trust, and that he has used this measure of vigilance, care and prudence in making the selection. This is as it should be. He is selected for his supposed fitness for a careful discharge of the duties of the trust, and gives security therefor. Without showing such actual necessity and such careful selection, he cannot be heard to say, 'I turned the discharge of a part of my duties over to an agent, and he has misapplied the funds, or they have been lost through his negligence.' Without showing such actual necessity for using the services of another, and such care in his selection, such agent is the chosen agent of the executor or administrator, his hand in executing the trust, answerable to him alone, and he is answerable over to the estate for any loss sustained by the employment. There would be no safety for estates upon any other basis. The careful inquiry into the fitness of the person proposed, his selection and appointment, and the requirement of security for the faithful performance of the duties of the appointment, might as well be dispensed with, if he can, at pleasure, turn the discharge of the duties over to agents and attorneys, and shield himself from responsibility for their misdeeds and negligence, in the discharge of duties cast by the appointment upon him personally."

a. *Views of Story, Sugden, Walworth and Kent.* As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes upon him, [or which has a tendency to interfere with the discharge of such duty. Upon this principle no one placed in a situation of trust or confidence in reference to the subject of a sale can be the pur-

" Wilmerding v. McKesson, 103 N. Y. 329.

chaser, on his own account, of the property sold. If such a one purchases the property, it is in the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, to set aside the sale, within a reasonable time, however innocent the purchaser may be."

In Sugden on Vendors, the rule and its reasons are expressed as follows: "It may be laid down as a general proposition that trustees, unless they are nominally such, as trustees to preserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel or any person who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, for, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest venditor vendit quam maximo potest.*"¹⁸

In *Imboden v. Hunter*, 23 Ark. 622, the court said: "It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price; and as purchaser, it is his interest to get it for the lowest; and these relations are so essentially repugnant — so liable to excite a conflict between self-interest and integrity — that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule that the sale was *bona fide*, and for a fair price. The inquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent and the security against discovery so great, that a court of equity, at the instance of the *cestui que trust*, if he applies in a reasonable time, will set aside the sale, as of

¹⁸ 1 Story, Eq. Jur., secs. 307-323, 887; *Michoud v. Girod*, 45 U. S.; 4 How. 504; 11 L. ed. 1077.

¹⁹ 2 Sugd. Vend., 7th Am. ed.

course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party itself works his disability to purchase. * * * The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation of trust or confidence with reference to the subject of the purchase. It embraces all that comes within its principle, permitting no one to purchase property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchase on his own account, and for his individual use."

The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase, it is not necessary to show that it was actually fraudulent or advantageous. If the trustee or other person having a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty, and the hazard of abuse, and to remove the trustee and other persons having confidential relations from temptation, that the rule does and will permit the *cestui que trust* or other person to come at his option, and without showing actual injury or fraud, have the sale set aside.⁸⁰

⁸⁰ Davoue v. Fanning, Johns. Ch. (N. Y.) 252, 1 L. ed. 365; Torrey v. Bank of Orleans, 9 Paige (N. Y.), 663, 4 L. ed. 859; *Ex parte* James, 8 Ves. Jr. 345; Brockett v. Richardson, 61 Mass. 766; Van Epps v. Van Epps, 9 Paige (N. Y.), 237, 4 L. ed. 682; Campbell v. Walker, 5 Ves. Jr. 678; 13 Ves. Jr. 601; Callis

v. Ridout, 7 Gill & J. 1; *Ex parte* Lucey, 6 Ves. Jr. 625; *Ex parte* Bennett, 10 Ves. Jr. 381; Campbell v. Pennsylvania L. Ins. Co., 2 Whart. 62; Michoud v. Girod, 45 U. S.; 4 How. 557, 11 L. ed. 1100, and cases before cited; McGaughey v. Brown, 46 Ark. 25.

In *Sweet v. Jacocks*, 6 Paige (N. Y.), 355, 364, Chancellor Walworth said: "It is a settled principle of equity that, where a person undertakes to act as an agent for another, he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit. And if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal."

The rule that one clothed in a fiduciary character cannot either directly or indirectly become a purchaser of the trust property at his own sale and hold such property against the dissent of the *cestui que trust* is of such universal prevalence and so grounded in the demands of public policy that no one ventures to question its existence, or seeks now to overthrow it. In looking at the many cases involving consideration of this doctrine a sale by or under the control of the trustee is not always present as a feature in the litigations which in judicial judgment have called for the application of the salutary principle which the rule embodies. Its adoption is to prevent, as far as possible, fraud on the part of those having the control of trust property, and to protect, to the largest possible extent, the beneficiaries of such trusts, who without this safeguard, are found by experience to be grievously exposed to the hazard of fraud and wrong doing, such as courts find difficult, if not impossible, to redress. The necessity of placing guards around those whose interests are intrusted to the agency and control of others, springs out of the weakness and infirmity of human nature, which observation and experience show is not proof against the seductive and insidious influence of selfish interest, and ought not to be put to the temptation to acquire personal gain through failure in, or unfaithful performance of, fiduciary obligations. It recognizes the difficulty, if not impossibility, of tracing actual fraud in every case, and the frequent failure of justice and success of wrong that must be consequent thereon, and it attempts to apply a method that will remove all temptation from the mind of the trustee to profit by infidelity in the discharge of trust duties of every sort, and which will remove all inducements to act otherwise than faithfully toward the beneficiary, by utterly refusing to consider the

question of good or bad faith, and holding the trustee who attempts to deal with the trust property as an individual to all the chances of loss, and denying to him all possible gain. This rule, although perhaps most frequently found applied in the decided cases where the existing fact is a sale by or under the direction of a trustee, is by no means limited to that circumstance, as reference to decided cases will show.⁸¹

The same chancellor, in *Van Epps v. Van Epps*, 9 Paige (N. Y.), 237, states the doctrine in this wise: "The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees or solicitors. But it is a rule which applies universally to all who come within its principle; which principle is that no party can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchase on his own account and for his individual use."

Chancellor Kent said in *Davone v. Fanning*, 5 Johns. Ch. (N. Y.) 252, "that if a trustee, acting for others, sells an estate and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, as of course, and set aside that purchase and have the property re-exposed for sale." At page 259 he says: "However innocent the purchase may be in the given case, it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep and touches the very root of the

⁸¹ Rice's Probate Law, 407.

evil. It is one which appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established." The rule seems to have been established in this case that the *cestui que trust* may elect to set aside the sale, and that it would be proper for the court to order a resale at the price bid by the trustee; and if it does not sell for more, then the purchase is to stand. The right of the *cestui que trust* to this election is recognized in *Barker v. Smith*, 1 Dem. (N. Y.) 290, where it is held that "if the property is still in the possession of the executor, it is within the power of the court to require him to restore it to the estate. He ought not to have bought it, and ought not to be allowed to retain it against objection, even if it were admitted that he purchased in good faith and paid an adequate consideration, but the parties entitled to object to such purchase are at liberty to sanction it." * * * In *Jackson v. Walsh*, 14 Johns. (N. Y.) 411, it was stated that the rule was to order a resale, and if the property sells for more, the *cestui que trust* takes the surplus; otherwise the original sale stands.⁸²

In *Gardner v. Ogden*, 22 N. Y. 327, numerous authorities are examined by Mr. Justice Davies, and the principle announced is, that a trustee can never be a purchaser, and a guardian, trustee or other person standing in a fiduciary capacity, cannot deal with or purchase the property in reference to which he holds that relation.⁸³

A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee and as he held the original lease. This does not depend upon any right which the *cestui que trust* has to the renewal, but upon the theory that the new lease is, in technical terms, "grafted" upon the old one; and that the trustee has a facility by means of his relation to the estate for obtaining the renewal from which he shall not personally profit. This doctrine extends to commercial partnerships; and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely or "behind the backs" of his associates for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners or to the firm. It is of no

⁸² Rice's Probate Law, 408.

⁸³ Forbes v. Halsey, 26 N. Y. 53.

consequence whether the partnership is for a definite or indefinite period. The disability to take the lease for individual purposes grows out of the partnership relation. While that lasts the renewal cannot be taken for individual persons, even though the lease does not commence until after the expiration of the partnership. And it cannot necessarily be assumed that the lease can be taken by an individual member of the firm even after dissolution. The former partners may still be tenants in common, or there may be other reason of a fiduciary nature why the transaction cannot be entered into.⁸⁴

b. *Fraudulent acts of trustees—how established.* It may be further observed that slight proof is necessary to establish a fraudulent intent between parties who occupy confidential relations.⁸⁵ If fraudulent intent was a matter of proof by direct and positive testimony it would result in a practical frustration of justice and render all attempts as to its disclosure abortive. The law is satisfied, therefore, with a reasonable degree of certainty, and this position is abundantly sustained by the adjudged cases.⁸⁶

In all investigations of questions involved in fraud the courts extend an exceptional liberality to the admission of evidence⁸⁷ and a broad interpretation is to be afforded to all the rules of relevancy.⁸⁸

If desirable to summarize the legal conclusions on this subject, it will be entirely accurate to state that parol evidence is always competent to establish the fraudulent omission or insertion of any material averment in the recitals of a contract, and such evidence is also admissible whenever the

⁸⁴ Dwight Commissioner, in Mitchell v. Read, 61 N. Y. 123.

⁸⁵ Fisher v. Herron, 22 Neb. 183; Long v. Milford, 17 Ohio St. 484, 93 Am. Dec. 638; Fisher v. Bishop, 10 Cent. Rep. 707, 108 N. Y. 25.

⁸⁶ Southern L. Ins. Co. v. Wilkison, 53 Ga. 535; Conant v. Jackson, 16 Vt. 335; O'Donnell v. Segar, 25 Mich. 367; Stanfield v. Stiltz, 93 Ind. 249; Strong v. Hines, 35 Miss. 201; Brower v. Goodyer,

88 Ind. 572; Parrott v. Parrott, 1 Heisk. 681; Massey v. Young, 73 Mo. 260; Graham v. Roder, 5 Tex. 141; Smalley v. Hale, 37 Mo. 102; Burch v. Smith, 15 Tex. 219; Thompson v. Shannon, 9 Tex. 536.

⁸⁷ Zerbe v. Miller, 16 Pa. 488; Hopkins v. Seivert, 58 Mo. 201; Stauffer v. Young, 39 Pa. 455.

⁸⁸ Smalley v. Hale, 37 Mo. 102; 2 Rice Evidence, 953.

obligation has been contracted in *fraudem legis*. The contracted form of the reprobative matter is of no consequence.⁸⁹

c. *Rule as to preservation and care of trust property.* "In regard to the preservation and care of trust property," says Story in his Commentaries on Equity Jurisprudence, "it has been said, that a trustee is to keep it as he keeps his own. And, therefore, if he is robbed of money belonging to his *cestui que trust*, without his own default or negligence, he will not be chargeable. * * * The rule in all cases of this sort is, that when a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses."⁹⁰

Investments carefully and judiciously made are not, as a rule, to be disturbed. As was said by the court in *Harvard College v. Amory*, 9 Pick. 461: "All that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

The very recent case of *New England Trust Co. v. Eaton*, 140 Mass. 532, reaffirms the doctrine of the foregoing case, holding that "the investment of trust property should be made with a view of permanency, and not in a spirit of speculation."

The rule "that no investment can be considered safe, or can be approved by a court of equity, except in public securities, however well supported by authorities," says Chief Justice Shaw, "as a rule well established in English courts of equity, is wholly inapplicable and untenable in this country."⁹¹

⁸⁹ Waddell v. Glassell, 18 Ala. 561; Bottomley v. United States, 1 Story, 135; Hunter v. Bilyeu, 30 Ill. 228; Townsend v. Cowles, 31 Ala. 428; Lunday v. Thomas, 26 Ga. 538; Pierce v. Wilson, 34 Ala. 596; Hamilton v. Conyers, 28 Ga. 276; Stannard v. McCarty, Morris

(Iowa), 124; Bartle v. Vosbury, 3 Grant, Cas. 277.

⁹⁰ 2 Story's Eq. Jur., § 1269; Perry on Trusts, secs. 404, 441; Lewin on Trusts (6th Lond. ed.), 224, 260; Litchfield v. White, 7 N. Y. 438.

⁹¹ Lovell v. Minot, 20 Pick. (Mass.) 116.

While there are now many more public securities than those which existed when this remark was made, investments cannot be confined to them. A loan at a fixed rate of interest, even if secured by the stock of a manufacturing or other business corporation as collateral security, if proper security is taken against fluctuations, is not necessarily injudicious.⁹² There are many stocks under public supervision, bonds of corporations where there is sufficient capital to insure their safety, which, with bonds of municipalities, loans secured by mortgages, etc., constitute proper investments.⁹³

In some States there is a statutory rule stating what investments may be made of trust funds. In other States, the rule is that if the investment is made in good faith and with sound discretion at the time of the investment, the trustee is not liable for loss, for a trustee does not guarantee the security of investments, but is protected if he acts as an ordinary prudent man would act in the case of his own estate. In New Jersey the investment may be on mortgage, at the highest rate of interest procurable, or in United States or New Jersey State bonds; but not in municipal bonds or bank stock, nor personal security. In Maryland, it has been held that the statute which gives the probate court power to authorize an investment by an executor or administrator in bank stock or other good security, furnishes an analogical protection for an executor who has, in good faith, invested in such stock without the protection of an order of the court. In New Jersey, a statute provides that an executor may continue the investments of his testator without liability for loss, if he does so in good faith and in the exercise of a sound discretion.⁹⁴

"Every trustee must be presumed by the court before whom his account is taken to use in his own concerns such diligence as is commonly used by all prudent men. The diligence of a provident man, therefore, is the measure of a trustee's duty." The same rule is stated in Willis on Trustees, 125. It was said by Chancellor Kent, in the case of *Smith v. Smith*, 4 Johns. Ch. 284, after quoting the English

⁹² *Brown v. French*, 125 Mass. 410; S. C. 28 Am. Rep. 254.

⁹⁴ *Croswell on Exrs. and Admr.*, sec. 441.

⁹³ *Rice's Probate Law*, 403.

authorities: "Personal security is always more or less precarious; particularly when the credit is given for a considerable length of time, or when the borrower, or his surety, is engaged in mercantile or other hazardous pursuits. * * * I have no doubt that it is a wise and excellent general rule that a trustee loaning money must require adequate real security, or resort to the public funds." In the case of *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 628, the chancellor wrote with approval the opinion of Lord Hardwicke in *Knight v. Lord Plymouth*, 3 Atk. 480, in which it was held that a receiver, who had deposited money with a banker, of good credit, who afterwards failed, as the receiver was not chargeable with any willful default or fraud, was not responsible for the loss. The views of the chancellor as to the exact rule to be adopted in fixing the responsibility of trustees are not very definitely expressed. In Massachusetts the court requires of a trustee only that he shall exercise such sound discretion as a prudent man would be expected to use in his individual investments, having regard to the safety of the fund. Investments in stock of insurance, banking and railroad corporations, have been allowed.⁹⁵ The same latitude is allowed by the courts of New Hampshire and Vermont.⁹⁶ In many of the Southern States the same rule is observed, and even legislative enactments have been adopted authorizing trustees to invest upon personal securities. The courts of Pennsylvania and New Jersey incline to look with disfavor upon investments in stock corporations, approving only real estate mortgages and government securities.⁹⁷ The Supreme Court of the United States, in the case of *Lamar v. Micou*, 112 U. S. 452, says: "The general rule is everywhere recognized that a trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs."⁹⁸

⁹⁵ *Bowker v. Pierce*, 130 Mass. 262; *Brown v. French*, 125 Mass. 410; *Harvard College v. Amory*, 9 Pick. (Mass.) 446.

⁹⁶ *French v. Currier*, 47 N. H. 88; *Barney v. Parsons*, 54 Vt. 623.

⁹⁷ *Halsted v. Meeker's Exrs.*, 18 N. J. Eq. 136; *Ihmsen's Appeal*, 43 Penn. St. 431.

⁹⁸ *Rice's Probate Law*, 400-2.

“Trust moneys may be deposited for a reasonable time in a bank having good credit, if the deposit is made to the credit of the trust estate, and not in the trustee’s individual name and account; and the trustee does not become liable for a loss occasioned by a failure of the bank under those circumstances.”⁹⁹

The result of the foregoing authorities is, that a trustee is not liable merely because, instead of undertaking to keep the trust money safely in his own house, he deposits it in a private bank which fails, not because the bank is weak, unless that fact was known to the trustee, or might have been known by the exercise of ordinary prudence and diligence. The question in all such cases is, was the trustee reasonably prudent and diligent in making or continuing the deposit? If so, he will not be liable, although the bank was and had been insolvent. Such insolvency will not affect him unless he knew it, or unless it was generally known; or unless there were general rumors, injuriously affecting the credit of the bank, which were known to the trustee, or might have been so known by reasonable diligence. There is a class of cases in which trustees have been held liable for losses on investments made contrary to the directions of the instrument creating the trust, or without any authority to invest, or upon personal security merely.¹⁰⁰

Trustee acting in good faith treated with indulgence. A trustee, as a general rule, is not held responsible for any losses occurring in the management of the trust property, so long as he acted in good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property.¹⁰¹ It has also been held that each of several trustees is not bound to take upon himself the conduct of every part of the trust, and that where, according to the reasonable necessities of business, trust funds came into the hands of one trustee and a loss happened from the default of such trustee, the others were not liable, though for the sake of conformity they joined in the execution of a

⁹⁹ 2 Pom. Eq. Jur., sec. 1067; and 525; Perry on Trusts, sec. 465; see McCabe v. Fowler, 84 N. Y. Rice's Probate Law, 399.

314.

¹⁰¹ 2 Story's Eq. 154, sec. 1272.

¹⁰⁰ Rehden v. Wesley, 29 Beav.

receipt or conveyance or other disposition of the trust estate. But this exemption from liability exists only when it is made to appear that the default of one occurred in spite of the exercise of the requisite care and diligence by those who seek immunity. The moment the want of care and diligence is shown, which contributed to the loss, the case is taken out of the general rule and the liability attaches. It is the same in the case of executors. That in such a case executors are liable, has been held in *Clark v. Clark*, 8 Paige (N. Y.), 153; *Adair v. Brimmer*, 74 N. Y. 566; *Croft, as executor, etc.*, v. *William*, 23 Hun (N. Y.), 102.

And that trustees are liable has also been repeatedly affirmed. Thus, in *Townley v. Sherbourne*, Bridg. 35, Lord Keeper Coventry, under the advice of the associate judges, after deciding that a trustee was not liable for rents which had properly come into the hands of a co-trustee, and had not been paid over, said: "But, if, upon proofs or circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud or evil intent in him that permitted his companion to receive the whole profits, he should be charged, though he received nothing."

In *Thompson v. Brown*, 4 Johns. Ch. 619, Chancellor Kent holds that executors and administrators, acting in good faith, and without willful default or fraud, will not be responsible for the loss which may arise.¹⁰² In discussing the question of a *devastavit* by an executor, Williams on Executors lays down the rule that an executor is not guilty of a *devastavit* provided he exercised fair and reasonable discretion on the subject.¹⁰³

d. *The measure of responsibility imposed.* It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied.¹⁰⁴ What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a

¹⁰² See *Schultz v. Pulver*, 11 on Exrs. 1539 (6th ed.); *Rice, Probate Law*, 400.
Wend. (N. Y.) 361; *Ruggles v. Sherman*, 14 Johns. (N. Y.) 446.

¹⁰⁴ *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

¹⁰³ See *Barn. & Ald.* 360; *Wms.*

manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit, and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value, and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of those trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification.

It is true that authorities are found which will hold the trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that phrase has been found to mean the absence of ordinary care and diligence adequate to the particular case. In *Scott v. De Peyster*, 1 Edw. Ch. (N. Y.) 513, 543 — a case much cited — the learned vice-chancellor said: "I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns. To require more would be adopting too rigid a rule, and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only — which is very little short of fraud itself." In *Spering's Appeal*, 71 Penn. St. 11, Judge Sharswood said: "They (directors) can only be regarded as mandatories — persons who have gratuitously undertaken to perform certain duties, and who are, therefore, bound to employ ordinary skill and diligence, but no more." In *Hodges v. New England Screw Co.*, 1 R. I. 312, Jenckes, J., said: "The sole question is whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care; such as prudent men take in their own affairs." And, in the same case, Ames, J., said: "They should not, therefore, be liable for innocent mistakes, unintentional negligence, honest errors of judgment, but only of willful fraud or neglect, and want of ordinary knowledge and

care." The same case came again under consideration in 3 R. I. 9, and Green, Ch. J., said: "We think a board of directors acting in good faith and with reasonable care and diligence, who nevertheless fall into mistake, either at law or fact, are not liable for the consequences of such mistake." In the case of *The Liquidators of the Western Bank v. Douglas*, 11 Session Cases (3d series), 112 (Scotch), it is said: "Whatever the duties (of directors) are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend, to a large extent, on the circumstances. It is enough to say that gross negligence in the performance of such a duty, the want of reasonable and ordinary fidelity and care, will impose liability for loss thereby occasioned." In *Charitable Corporations v. Sutton*, 2 Atk. 405, Lord Chancellor Hardwicke said, that a person who accepted the office of director of a corporation "is obliged to execute it with fidelity and reasonable diligence," although he acts without compensation.¹⁰⁶

Trustees are not bound to extraordinary diligence in the preservation and protection of the trust estate. The law contemplates only ordinary diligence — reasonable activity in looking after the interests of the beneficiary.¹⁰⁶ The office is preeminently one personal to the trustee, and for this reason he cannot delegate it to any other person.¹⁰⁷ And he must so invest the funds confided to his care that in the event of loss it will abundantly appear that the investment made was fairly such a one as good judgment and reasonable prudence would dictate. Ordinarily he should confine his investments to real estate securities.¹⁰⁸ Manifestly an investment made on the direction of the court would exonerate the trustee in the event of loss.¹⁰⁹ Investment in personal securities has been quite generally condemned. But the rule is

¹⁰⁶ Rice's Probate Law, 393.

¹⁰⁶ Kimball v. Reding, 31 N. H. 352; Commissioners v. Walker, 7 Miss. 143; Hutchinson v. Lloyd, 1 Wis. 286; Knowlton v. Bradley, 17 N. H. 458.

¹⁰⁷ Taylor v. Hopkins, 41 Ill. 442.

¹⁰⁸ Gray v. Fox, 1 N. J. Eq. 259.

¹⁰⁹ Brown v. Wright, 39 Ga. 96; Gray v. Fox, *supra*.

apparently ignored in New Hampshire, certainly with some show of reason. Real estate securities are not so highly favored as they were before the mania for western mortgages had reached its height. And there can be no valid reason in this commercial age why we should cling to an English rule that calls for a real estate investment in such instances.¹¹⁰ The promissory note of a good solvent debtor must be, under most of the authorities, declined by the trustee as an investment. But he is at liberty to take somebody's valuation on a farm "out West," and as this is "real estate," his judgment will, perhaps, be vindicated if the circumstances of the situation showed fair diligence. Universally government bonds or State securities are favorably regarded, and such an investment would be considered as provident and thrifty management provided they were purchased at the ruling market rate.¹¹¹ Generally, it has been held that a trustee is exonerated if he follows the direction of the trustor in the investment of the trust property. The proposition may be doubted. The trustor may have been a man of exceptional business capacity, but with advancing years, and increasing infirmities, his aptitude for business management disappears, and at the time of creating the trust estate he inserts a recommendatory clause as to the investment of the property, that might be wholly destitute of sagacity under the altered condition of things. Time was when an investment in Panama Canal stock might be judicious, but the situation was gradually indicating a collapse to far-seeing men, and would a direction to invest the avails of a trust estate in such a manner relieve the trustee of all responsibility in the event of loss? Can he place the funds in such a manner, and then, when the ruin comes, claim that he followed the instructions of the trustor? The trustee should not deposit trust funds in a private bank, nor in his own name in any bank.¹¹² Nor is he allowed to take investments in his own name so

¹¹⁰ See *Knowlton v. Bradley*, 17 N. H. 458.

¹¹¹ *Brown v. Wright*, *supra*; *Tucker v. Tucker*, 33 N. J. Eq. 235.

¹¹² *Jenkins v. Walter*, 8 Gill & J. 218; *Barney v. Saunders*, 57 U. S.

535.

that he is the ostensible owner.¹¹³ In a general way it may be said that he must keep in view the purposes of the trust, and exercise such judgment as is becoming a prudent man governing his own affairs.

It seems that, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, and the trustee who so invests does so at the peril of being held responsible for the safety of the investments.

This rule, however, is not so rigid as to admit of no possible exceptions, although the case must be very rare and the circumstances very unusual and peculiar to make it an exception. The rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security.¹¹⁴

Under the rules of law, as they have been judiciously construed, which controls trustees in the management of estates committed to their care, and which fix the measure of their responsibility the loan of the trust property by the executors to a firm of stock brokers, without any security other than the personal obligation of the borrowers, or the employment of such property in a business of that character, with the permission or acquiescence of the executors, was unauthorized, and the executors became personally responsible for the fund, and in such cases interest at the full legal rate is chargeable against them so long as the prohibited use of the fund continues, and without regard to the productiveness of the investment.

The rule upon this subject is well stated by Chief Judge Ruger, in *Deobold v. Oppermann*, 111 N. Y. 538, where, speaking of the proper uses to which trust funds may be put, he says: "Their employment by the trustee in trade, or as loans

¹¹³ Ringgold v. Ringgold, 1 Har. & G. 11; Morris v. Wallace, 3 Pa. St. 319.

¹¹⁴ Ormiston v. Olcott, 84 N. Y.

to persons engaged in such business, or in the prosecution of mercantile, commercial and manufacturing enterprises of speculative adventures, has been uniformly condemned as illegal and as constituting a *devastavit* of the estate.¹¹⁵

In this view it is immaterial whether the trustees are themselves directly interested in the business undertaking in which trust moneys have been improperly invested. They become the debtors of the estate to the extent of the misappropriation, and the law prescribes the rate of interest upon every indebtedness where it is fixed by the agreement of the parties. The reason of the rule is, that as the primary act of the creation of a trust is ordinarily the preservation and perpetuity of the fund until the purposes of the trust have been accomplished, this object is necessarily endangered and may be entirely defeated by exposing the estate to the perils of commercial pursuits, which are always, to some extent, speculative and subject to the hazard of great loss.

In *King v. Talbot*, 40 N. Y. 86, it was declared that the degree of diligence and prudence which trustees are required to exercise in the care and management of trust estates "necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust and the consequences of a mistake in the selection of the investment to be made."¹¹⁶

It is frequently necessary for an executor or administrator to keep large sums in his hands, to answer the exigency of the testator's or intestate's affairs, particularly during the first year, and for that reason ordinarily, interest should not be charged against him during that period. It follows that if the money be kept separate and not mixed with his private funds interest will not, as a general rule, be charged in such a case. But even where the executor is justified in retaining the assets, if they have been employed by him to his own advantage, he is chargeable with interest on the ground that he cannot be allowed to make profit out of the estate. The English rule appears to be that an executor who is a trader, and deposits the funds of the estate at his bankers, in his

¹¹⁵ Rice Probate Law, 398.

¹¹⁶ Rice's Probate Law, 398.

own name, thus acquiring credit and increasing the balance in his favor, must therefore be considered as having used the money for his own benefit, and is to be charged with interest.¹¹⁷

In *Hasler v. Hasler*, 1 Bradf. (N. Y.) 248, Judge Bradford held that where an administrator held funds of the estate in cash over eighteen months, and did not show that the money was kept in bank, or otherwise ready to be paid over, and did not explain the causes of delay, he should be chargeable with interest, on the presumption of use of the funds.¹¹⁸

In Wharton on Negligence, § 519, we find the following: "A * * * trustee, * * * or executor has currency in hand belonging to his trust. Is he to keep this in his own house? This would be negligent, and would make him liable in case of loss, except under extreme circumstances of *vis major*. His duty is to deposit such funds in bank; and this duty is satisfied, apart from statutory limitations, if the bank, at the time of deposit, is in good reputation, and if there is nothing in way of public rumor subsequently occurring, which would lead a good business man to withdraw his funds."

e. *Trustees are not guarantors of their investments.* A trustee is not a guarantor for the safety of the securities which are committed to his charge, and he does not warrant such safety under any and all circumstances, and against all contingencies, accidents or misfortunes. The true rule which should govern his conduct is that he is bound to employ such prudence and diligence in the care and management of the estate or property, as in general, prudent men of discretion and intelligence employ in their own like affairs.¹¹⁹ While this rule requires a trustee to avoid all extraordinary risks in the investment of the moneys of the estate, and to keep the same safely, it does not demand that he shall be made liable for contingencies which, under ordinary circumstances, could not have been anticipated.¹²⁰

Nor are they liable for loss resulting from errors of judgment made in the discharge of their duties.¹²¹

¹¹⁷ 1 Bro. C. C. 285; 11 Ves. 61;
1 Russ. C. C. 151; 1 Coll. 177.

¹¹⁸ Matter of Mairs, 4 Redf. (N.Y.)
160.

¹¹⁹ King v. Talbot, 40 N. Y. 76.

¹²⁰ McCabe v. Fowler, 84 N. Y. 314.

¹²¹ Scott v. De Peyster, 1 Edw.
Ch. (N. Y.) 513. Sperring's Appeal,

f. *Liability of co-trustees.* The most obvious principles of equity would suggest the exemption of a trustee from liability for the fraudulent acts of his co-adjutor, provided he was entirely ignorant of those acts, and nothing had appeared to arouse suspicion. But, a co-trustee cannot sit in chronic apathy, and allow his partner in the trust to manage affairs at pleasure. It is his business to know the scope and nature of all transactions that take place. He who can prevent, when it is his duty to prevent—and does not prevent—assists.¹²² In *Bruen v. Gillett*, 44 Hun, 298, the defendant, Gillett, deposited with his co-trustee, who was a private banker, a large sum of money, representing the avails of an insolvent bank. The co-trustee became bankrupt under circumstances that at the time aroused some suspicion of careless management. The plaintiff, Bruen, brought suit to recover the amount of his loss from the defendant, Gillett, and the court sustained the action, and awarded judgment on the theory that it was Gillett's business to inform himself as to the financial stability of his co-trustee. In general, it may be said that the act of one, within the scope of his authority, binds all. But, in the more important relations of the trust, it is best that all should unite in some act evincive of joint responsibility or acquiescence. They have a

71 Penn. St. 11; *Miller v. Proctor*, 20 Ohio St. 442; *Gould v. Branch Bank of Mobile*, 11 Ala. 191; *Hodges v. N. E. Screw Co.* 1 R. I. 312; *Harmon v. Tappenden*, 1 East, 555; *Overend v. Gurney*, 4 Ch. App. 701; *Green's-Brice's Ultra Vires*, note, 407, 408; *Overend v. Gibb*, 5 H. of L. R. 480, 494; *Field on Corp.*, 183, 186; *Angell & Ames on Corp.*, sec. 314; *Hinley v. Merriman*, 39 Tex. 56, 62; *Ellig v. Naglee*, 9 Cal. 683, 695; *Salter v. Salter*, 6 Bush (Ky.), 638; *Cross v. Petree*, 10 B. Monr. (Ky.) 413; *Perry on Trusts*, sec. 276; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619, 627; *Knight v. Earl of Plymouth*, 3 Atk. 480; *Dickens*, 120; *Manhattan Bank v. Lydig*, 4

Johns. (N. Y.) 347; *Clark v. Anderson*, 13 Bush (Ky.), 111-117; *Griffith v. Follett*, 20 Barb. (N. Y.) 620, 634; *Kavanagh v. City of Brooklyn*, 38 Barb. 237; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150, 157, *158; *Williams v. Weaver*, 75 N. Y. 30, 33; *Lange v. Benedict*, 73 N. Y. 12; *Hawley v. James*, 5 Paige's Ch. (N. Y.) 318; *Perry on Trusts*, sec. 511; *Tiffany & Bullard on Trusts and Trustees*, 739; *Lewin on Trusts*, *338, 449 *et seq.*; *Hill on Trusts*, *488, 764; *Roosevelt v. Roosevelt*, 64 N. Y. 651; *Rice's Probate Law*, 404.

¹²² *Smith v. Rathbun*, 88 N. Y. 660; *Richards v. Seal*, 2 Del. Ch. 266.

joint power over the estate, and all who assume the obligations of the trust are, to a certain degree, liable in case the estate is defrauded through the single action of any one, or the collusive action of several.¹²³ And see the celebrated English case of *Townley v. Sherborne*, 1 Bridg. 35. Also reported in 3 Leading Ca. Eq. 718, and marginal notes. See, also, the subsequent case of *Brice v. Stokes*, 11 Ves. 319, which is distinguished by one of the most luminous opinions ever delivered by Lord Eldon. As has been previously stated, the functions of a trustee import personal confidence, and, therefore, cannot be deputed to another even if that other, be a co-trustee.¹²⁴ Mere ministerial acts not involving a transfer of the corpus of a trust may be performed by any one of the trustees.¹²⁵ But, as a general rule, the joint action should be preferred.

As a general rule, co-trustees are responsible only for their own acts. They may, by agreement to that effect, or by co-operation with or connivance in the act of another in violation of the trust, become themselves in one sense responsible for the act of a co-trustee. In the discharge of their trust, they must join in giving receipts and discharges for money paid them; but such joint receipts are open to explanation, and those only into whose actual possession and control the money has come will be liable for its subsequent misapplication. It is said that this rule does not apply to executors whose concurrence in acts relating to the estate is not necessary.¹²⁶

¹²³ *Wood v. Wood*, 5 Paige (N. Y.), 596; *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263; *Ringgold v. Ringgold*, 1 H. & G. 12.

¹²⁴ *Hawley v. James*, 5 Paige Ch. (N. Y.) 489.

¹²⁵ *Vandever's App.* 8 Watts & S. (Pa.) 405.

¹²⁶ *Hill on Trustees*, 471, note; *Kip v. Deniston*, 4 Johns. 23; *Leigh v. Barry*, 3 Atk. 584; *Sadler v. Hobbs*, 2 Bro. Ch. 117.

(g) *California Code Provisions on the subject—Obligations of trustees.*—Sec. 2228. Trustee's obligation to

good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Sec. 2229. Trustee not to use property for his own profit. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.

Sec. 2230. Certain transactions for-

h. Compensation of trustees. While it is entirely foreign to the nature and scope of the present undertaking to indulge

bidden. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so;

2. When the beneficiary not having capacity to contract the proper court, upon the like information of the fact, grants the like permission; or,

3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed. (54 Cal. 106.)

Sec. 2231. Trustee's influence not to be used for his advantage. A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

Sec. 2232. Trustee not to assume a trust adverse to interest of beneficiary. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.

Sec. 2233. To disclose adverse interest. If a trustee acquires any interest, or becomes charged with

any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

Sec. 2234. Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust. (52 Cal. 406.)

Sec. 2235. Presumption against trustees. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

Sec. 2236. Trustee mingling trust property with his own. A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events.

Sec. 2237. Measure of liability for breach of trust. A trustee who uses or disposes of the property, contrary to section 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest.

Sec. 2238. Same. A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and

in any elaborate analysis of the rules regulating the payment of a trustee it may be well to remark that his compensation is, in this country, largely regulated by statutory provisions. These provisions are far from uniform, and depend in many instances upon the amount represented by the trust, its nature and situation, its freedom from litigation, and the value of the services performed. There is a disposition to regard trustees as falling within the same category with executors and administrators, and hence entitled to the same remuneration.¹²⁷ Justice Story says: "The policy of the law ought to be such as to induce honorable men without a sacrifice of their private interests, to accept the office, and to take away the temptation to use the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character."¹²⁸ Frequently the compensation is left to the sound discretion of the court based upon a careful review of the circumstances surrounding the trust estate.¹²⁹ In New York the matter is regulated by a graduated scale varying from five to one per cent, and computed upon the amount represented by the trust. In addition to this there is an allowance for disbursements.¹³ Similar provisions exist elsewhere, but in none of the States does the allowance exceed five per cent on the gross valuation of the trust property.

i. *Of trustees ex-maleficio.* A trustee, *ex-maleficio* is "one who by wrongful or illegal conduct becomes or is held to be a trustee."¹³¹ The abhorrence for all forms of fraud and duplicity is so engrafted upon the principles of both law and equity, that at an early day it was found expedient to fasten upon a wrongdoer the character of a trustee, and in this

with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error.

Sec. 2239. Co-trustees, how far liable for each other. A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enabled the latter to commit,

but for no others. (Cal. Civil Code, §§ 2228-2239.)

¹²⁷ Ogden v. Murray, 39 N. Y. 202, Gibson's Case, 1 Bland's Ch. 138; Clark v. Platt, 30 Conn. 282.

¹²⁸ 2 Story's Eq. Jur., sec. 1268.

¹²⁹ Tuttle v. Robinson, 33 N. H. 118.

¹³⁰ Stevenson v. Maxwell, 2 Sandf. Ch. 284.

¹³¹ Anderson's Law Dict.

way prevent a miscarriage of justice. It has been found very effective in practice as a means of circumventing fraud.¹³² So an oral promise to make a will in another's favor, in consideration of the deed from that other is within the Statute of Frauds, but if made with a fraudulent intent to obtain the deed without consideration the statute does not apply, and the grantor becomes a trustee *ex-maleficio* of the property so acquired.¹³³ Many instances of such a trusteeship spring from the relation of principal and agent, and it is elementary law that if an agent purchases lands with money belonging to his principal, and takes title in himself without the principal's knowledge, the land or the proceeds arising from it will be impressed with a trust in favor of the principal which the court will recognize at all times.¹³⁴ It is a general rule of wide acceptance that where money of one person is wrongfully used by another, the defrauded party may follow it into the lands purchased with the money, and the court will hold the purchaser as a trustee *ex-maleficio* for the party defrauded.¹³⁵ In cases of this nature, the implication of a trust from the fact that the consideration for the purchase was paid by one, while the land was conveyed to another, may be overcome or disproved, or may be corroborated, by any oral or written testimony showing the circumstances of the transaction and the expressed or probable intention of the parties. The admissions or agreements of the parties, even if oral, may then be proved as tending to destroy or confirm the inference deducible from the facts of payment of consideration and of the deed.¹³⁶ So, an administrator attempting to manage the real estate of the decedent instead of selling it for the payment of debts has done that which he has no power or legal right to do, and he is held as a trustee *ex-maleficio*.¹³⁷ Any one wrongfully dealing with an

¹³² Shaffner v. Shaffner, 145 Pa. St. 163; Jones v. Van Doren, 130 U. S. 684; Easterly v. Barber, 65 N. Y. 252.

¹³³ Manning v. Pippen, 86 Ala. 357.

¹³⁴ Kraemer v. Deustermann, 37 Minn. 469.

¹³⁵ McClung v. Steen, 32 Fed.

Rep. 373; Moore v. Stinson, 144 Mass. 594.

¹³⁶ Blodgett v. Hildreth, 103 Mass. 484; McGivney v. McGivney, 142 Id. 156.

¹³⁷ McCoy v. Scott, 2 Rawle. 222; Le Fort v. Delafield, 3 Edw. Ch. (N. Y.) 32.

estate by artifice or concealment is answerable to the beneficiary, and equity will compel the trustee *ex-maleficio* to execute such conveyances as the court directs.¹³⁸

In Pomeroy's Eq. Jur. sec. 155, the author says, citing many cases: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." And again, in section 1053: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex-maleficio* or *ex-delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."¹³⁹

¹³⁸ Felix v. Patrick, 145 U. S. 317.

¹³⁹ See generally on this topic Rose v. Hayden, 35 Kan. 106; Burden v. Sheridan, 36 Iowa, 125; Deppester v. Gould, 3 N. J. Eq. 474; Lefevre's App., 69 Pa. St. 122; Farley v. Blood, 30 N. H. 254; Mc-

Larren v. Brewer, 51 Me. 402; Tilford v. Torrey, 53 Ala. 120; Hancock v. Titus, 39 Miss. 234; Settembre v. Putnam, 30 Cal. 490; Woodford v. Stevens, 51 Mo. 443.

The mere breach of an oral agreement standing alone, though often

§ 218. The Statute of Limitations and its effect upon trusts.

Equity acts in strict analogy with the rules of law. In fact it is a maxim of wide acceptance that equity follows the law. Hence, by lapse of time the extinguishment of a trust may be presumed where other circumstances seem to require it. In law the Statute of Limitations may be pleaded in bar of an alleged indebtedness. And the statute may be invoked with equal force in equity. But if there is an allegation of fraud, or the circumstances of the case are such as to raise the suspicion of its presence, the court will deny the Statute of Limitations any right to run during the period in which the fraud has been successfully concealed and practiced.¹⁴⁰ And the statute will not begin to run in favor of a trustee who has received funds from his beneficiary, until a demand has been made for repayment.¹⁴¹ It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every

a moral wrong, is not sufficient to establish that fraud in procuring the title which is requisite to render the grantee or devisee a trustee *ex maleficio*, although the fact of such breach may be looked into, in connection with the other circumstances of the case, as sometimes constituting one of several links in a chain of facts tending to prove fraud. (Brock v. Brock, 90 Ala.

86; Patton v. Beacher, 62 Ala. 579.) The element of agency is usually required to fasten such a relation upon a party. (Hoge v. Hoge, 1 Watts, 163. See generally upon this proposition, 2 Pom. Eq. Jur., secs. 1055, 1056.)

¹⁴⁰ Piatt v. Oliver, 2 McLean, 267; Bank of U. S. v. Beverly, 1 How. 134; Boone v. Chiles, 10 Pet. 177.

¹⁴¹ Taylor v. Benham, 5 How. 233.

difficulty, real or apparent, with which it may be encumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory, and human infirmity, is, that the material facts can be given with certainty to a common intent; and, if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law for exact knowledge. Fraud, or breach of trust ought not lightly to be imputed to the living for the legal presumption is the other way; and, as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt.¹⁴⁹

As was said in the case of *Hall v. Russell*, 3 Sawy. 515: "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trust, where it is sought, for the purpose of maintaining the remedy, to force upon the defendant the character of trustee, courts will apply the same limitation as provided for actions at law."

§ 219. The declaration of trust. The owner of any freehold interest in land or chattels real may make a declaration of trust. Such declaration is equally valid as to personal property, but as this is not within the scheme of the present undertaking, no further reference will be made to trusts in personal property. The declaration should be in clear and unequivocal language, although it is not necessary that the legal estate should be transferred to some third person called a trustee. There is a widely prevalent notion that this is absolutely necessary to the creation of a trust, and such notions are in need of immediate suppression, as it is abundantly settled that the owner of property may convert his ownership into a trusteeship provided the declaration of trust is sufficiently explicit, and there is such consideration as will support a trust without contravening the rights of creditors.

¹⁴⁹ *Prevost v. Gratz*, 6 Wheat. 481.

The consideration is, however, frequently nominal.¹⁴³ In the case of express trusts the provisions of the Statute of Frauds apply, and the declaration should be made in writing. It need not take the form of a deed or for that matter any particular form, and may be evidenced by a mere note or memorandum. Even a letter has been held to be sufficient.¹⁴⁴ See a celebrated case in which the late General Burnside was involved.¹⁴⁵ The New York Court of Appeals say that any language is sufficient to create the trust, provided the intent to create is one fairly deducible from the instrument.¹⁴⁶ It is not necessary that the beneficiary should have knowledge of the declaration. If he has, his assent will be assumed on the theory that no man will repudiate what is for his own interest.¹⁴⁷ In some jurisdictions a trust may be proved by parol.¹⁴⁸ But this would seem to infringe the first principles of the Statute of Frauds, and open a wide door for interminable abuses.

In *Snelling v. Utterback*, 1 Bibb. (Ky.), 609, the court say that "where the conveyance is taken to one, and no declaration in writing that the purchase was made in trust for another, and the trust is denied by the answer of him who is charged as trustee, it was formerly holden that no evidence *aliunde* was admissible to show that the purchase was made with trust money whereby to raise a trust in favor of the *cestui que trust*."¹⁴⁹ And though modern decisions have in some measure mitigated the rigor of this rule and permitted parol evidence to establish the trust, yet such evidence must be very clear and satisfactory, or it will be held insufficient."

§ 220. Incidents of trust estates. Real property held in trust is generally liable to sale on execution for the debts of

¹⁴³ See *Taylor v. Henry*, 40 Md. 550; *Minor v. Rogers*, 40 Conn. 512; *Young v. Young*, 80 N. Y. 422; *Urann v. Coates*, 109 Mass. 481; *Martin v. Funk*, 75 N. Y. 134.

¹⁴⁴ *Ray v. Simmons*, 11 R. I. 266;

¹⁴⁵ *Kingsbury v. Burnside*, 58 Ill. 310; *Barron v. Barron*, 24 Vt. 375; *Norman v. Burnett*, 25 Miss. 183.

¹⁴⁶ *Morse v. Morse*, 85 N. Y. 53.

¹⁴⁷ *Furman v. Fisher*, 4 Cold. 626; *Woodbury v. Bowman*, 14 Me. 154; *Hempstead v. Johnson*, 18 Ark. 123; *Stockard v. Stockard*, 7 Humph. 303.

¹⁴⁸ *Miller v. Thatcher*, 9 Tex. 482.

¹⁴⁹ *Newton v. Preston* Prec. Ch. 103; *Kirby v. Webb*, Prec. Ch. 84; *Kendar v. Milward*, 2 Vern. 440.

the beneficiary. But in some States the process by which this result is reached is an equity procedure.¹⁵⁰ But the trustee cannot encumber or charge the estate with his executory contracts unless the instrument creating the estate expressly authorizes such a proceeding.¹⁵¹ In the case last cited the courts say that if it is necessary for the safety and preservation of the estate to lay out considerable funds, and the trustee is without funds and not disposed to advance them himself, he may, by express agreement, make the expenditure a charge upon the trust estate. Such a ruling is eminently proper, and will be universally recognized as a correct exposition of the law. Trust estates are also liable to merger. But we must always remember that the doctrine of merger is suspended wherever, by allowing it to act, it will work an injustice. Broadly, it may be said, that merger will not be tolerated if justice requires that the estates should continue separate.¹⁵²

When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple is necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says (2 Jarm. Wills, 156): "Trustees take exactly the estate which the purposes of the trust require, and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inherit-

¹⁵⁰ Pritchard v. Brown, 4 N. H. 397; Matthews v. Stevenson, 6 Pa. St. 496.

¹⁵¹ Heath v. Richmond F. & P. Co. 4 Gratt. 482; New v. Nicoll, 73 N. Y. 127.

¹⁵² Earle v. Washburn, 89 Mass. 95 (1863); James v. Morey, 2 Cow. 246; Hunt v. Hunt, 31 Mass. 374; Bolles v. State Trust Co. 27 N. J. Eq. 308.

ance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what, less estate."

Chancellor Kent says: "The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding the devise to the trustee and their heirs, they take only a chattel interest where the trust does not require an estate of higher quality."¹⁵³

This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the Statute of Uses.¹⁵⁴

If a trust is declared in writing, parol evidence is admissible to contradict the expressed intentions of the instrument,¹⁵⁵ but if the instrument is vague and ambiguous, parol evidence may be introduced to assist in its interpretation.¹⁵⁶ An absolute conveyance of land cannot be shown by the grantor to be a grant in trust for himself, no fraud or mistake being alleged,¹⁵⁷ and evidence tending to show that a deed absolute of its face is a mortgage or a conveyance in trust, should be clear and received with great caution.¹⁵⁸ Want of consideration for a deed, possession of land by the grantor after conveyance, and the non-payment of the purchase money, may be put in evidence to show a trust relation.¹⁵⁹

If the instrument in any way indicates an intention of making a person the holder of both the legal and beneficial

¹⁵³ 4 Kent's Com. 233; Webster v. Cooper, 14 How. 499; Neilson v. Lagow, 12 How. 110; Doe v. Hicks, 7 T. R. 437; Curtis v. Price, 12 Ves. 99; Marrant v. Gough, 7 B. & C. 206; 1 Greenl. Cruise, 359, note.

¹⁵⁴ Doe v. Considine, 73 U. S. 458.

¹⁵⁵ Lewis v. Lewis, 2 Rep. in Ch. 77; Finch's case, 4 Inst. 86; Steere v. Steere, 5 Johns. Ch. (11 L. ed.) 987, 9 Am. Dec. 256; Simms v. Smith, 11 Ga. 198; Dickinson v. Dickinson, 2 Murph. 279; Lloyd v. Inglis, 1 De-saus, Eq. 333; Harris v. Barnett, 3 Gratt. 339; Mann v. Mann, 1 Johns. Ch. 234, 1 L. ed. 124; Ashley v.

Robinson, 29 Ala. 112, 65 Am. Dec. 387; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Lake v. Freer, 11 Ill. App. 576.

¹⁵⁶ Steere v. Steere, *supra*; Foster v. Hale, 3 Ves. Jr. 696; Taylor v. Taylor, 1 Atk. 386.

¹⁵⁷ Sturtevant v. Sturtevant, *supra*.

¹⁵⁸ Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Hurst v. Harper, 14 Hun, 283; Horn v. Keteltas, 42 How. Pr. 152; McMahon v. Macy 51 N. Y. 161.

¹⁵⁹ Vandever v. Freeman, 20 Tex. 33, 70 Am. Dec. 391; 1 Rice, Ev. 291.

estate, a trust cannot be created by parol.¹⁶⁰ Neither can there be a trust by parol where a valuable consideration is paid¹⁶¹ unless it can be proved by a person not privy to a deed.¹⁶² Where property was conveyed for the benefit of a child, though no declaration of trust appeared in the deed, evidence was admitted to prove it.¹⁶³ Whenever parol evidence is admitted to prove a trust or establish a trust it must be very clear and satisfactory.¹⁶⁴

The United States Supreme Court, in *Cook v. Tullis*, 18 Wall. 322, 341, say: "It is a rule of equity jurisprudence perfectly well settled and of universal application, that where property held upon any trust to keep or use or invest it in a particular way is misapplied by the trustee, and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*. * * * It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner, or the *cestui que trust*, and assignees and trustees in bankruptcy can acquire no interest in the property in its changed form which will defeat his rights in a court of equity."

Trusts never allowed to fail for want of a trustee. No phase of calamity can deprive the trust estate of a proper trustee to carry out the intentions of the donor. Death, in-

¹⁶⁰ Lewin, *Trusts*, 51; *Dean v. Dean*, 6 Conn. 285; *Philbrook v. Delano*, 29 Me. 410; *Starr v. Starr*, 1 Ohio, 321; *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

¹⁶¹ *Ib.*; *Gilbert, Uses and Trusts*, 56, 57; *Pilkington v. Bagley*, 7 Bro. P. C. 383.

¹⁶² *Squire's App.* 70 Pa. 266; *Storng v. Glasgow*, 2 Murph. 289.

¹⁶³ *Gay v. Hunt*, 1 Murph. 141;

Ross v. Norvell, 1 Wash. 14, 1 Am. Dec. 422.

¹⁶⁴ *Snelling v. Utterback*, 1 Bibb. 609, 4 Am. Dec. 661; *Hunter v. Bilyeu*, 30 Ill. 246; *Harrison v. Howard*, 1 Ired. Eq. 407; *Brady v. Parker*, 4 Id. 430; *Lyman v. United Ins. Co.* 2 Johns. Ch. (N. Y.) 630, 1 L. ed. 519; *Philpott v. Elliott*, 4 Md. Ch. 273; 1 Rice, Ev. 292-3.

sanity, protracted absence unexplained, lingering illness, none of these are allowed to frustrate the operation of the trust. Equity will invariably interpose its aid in such emergencies, and select some proper person to perform the duties of the trustee. But it must be remembered in this connection that mere "powers" frequently repose in the sound discretion of the donee. His action may depend entirely upon the exercise of sound judgment, or possibly his mere whim and caprice. And in such instances, the court can exercise no supervisory control over his actions. But we instantly encounter a distinction when this power — in itself purely discretionary — becomes coupled with a trust. In such a case the machinery of the equity court has full play, and what was formerly "may" now becomes most emphatically "must."¹⁶⁵ The owner of the legal estate may be compelled to execute proper conveyances, and equity will follow the property, and impress upon a fraudulent or collusive holder the character and attributes of a trustee *ex-maleficio*.¹⁶⁶ In compelling a conveyance, and in fact in any necessary case, the court will assume that the trustee's estate is large enough to cover all the purposes of trust. But he is never allowed to take a greater estate than the proper discharge of his trusteeship demands. For instance, if the trustee's duty requires the vesting in him of an estate for the life of another only, his legal interest will be cut down to that extent.¹⁶⁷ Equity always regards the beneficiary as the real owner of the property.¹⁶⁸

§ 221. **Classification of trusts.** So far as regards the duty of the trustee, trusts may be divided into active or special, and passive or simple trusts.¹⁶⁹ A simple trust arises in those cases where property is transferred to a certain person to be held in trust by that person, but without specific direction as

¹⁶⁵ Babbitt v. Babbitt, 26 N. J. Eq. 44; Greenough v. Wells, 10 Cush. (Mass.) 576; McCartney v. Bostwick, 32 N. Y. 53; Stone v. Griffin, 3 Vt. 400.

¹⁶⁶ Harris v. Rucker, 15 B. Mon. 564; Druid Park v. Dettinger, 53

Md. 46; Adams v. Adams, 21 Wall. 185.

¹⁶⁷ McCosker v. Brady, 1 Barb. Ch. 329.

¹⁶⁸ Jamison v. Glascock, 29 Mo. 191.

¹⁶⁹ Lewin on Trusts, 21.

to its management or ultimate control. The equity jurisdiction is exclusively relied upon to enforce the respective rights of the parties. Special trusts, on the contrary, are, as the name indicates, devoted to some special object, and they are exempt from any interference on the part of interested parties until the set purposes for which they exist are fully accomplished. In the case of passive trusts, we have the simple trust under another name. Nothing is to be done by the trustee except to convey the property to the beneficiary. They are otherwise known as barren, dry, or naked trusts.¹⁷⁰ Trusts are further considered as executed or executory. The first arises wherever the estate passes directly to the trustee by virtue and force of the instrument creating it, and without the observance of some further formality which is necessary to its operation as a trust. Executory trusts, on the other hand, are those that require some further action on the part of those interested in the property before the trust as such vests in the trustee. At their inception they are regarded as provisional, and contemplate some further conveyances, or the performance of some specific acts, before they fasten any liability upon the trustee. Again, an active trust, as its term imports, calls for the performance of some active duty on the part of the trustee, in order that he may retain the legal investiture of the estate. The distinction between this and a passive trust is quite obvious.

Further refinements have been attempted, and we find some text-books embodying the classification of ministerial and discretionary. The first resembles a simple trust. The trustee is merely called upon to perform some purely ministerial act, in the doing of which he is denied the exercise of any discretion whatever. While in the second, this element of discretion designates the peculiarity of the trust. And he is called upon to exercise such judgment and sagacity in the matter as any reasonable and prudent man would employ in similar circumstances. Ministerial and discretionary trusts are practically of slight importance in the absence of fraud or deceit. If the donor sees fit to vest absolute discretion in

¹⁷⁰ Passive trusts have been abolished in several States and should be in all.

the trustee, the courts will not interfere with the exercise of this discretion unless such gross perversion is present as would suggest bad faith.

With reference to their creation, trusts are again divided into express and implied trusts. This subdivision embraces a wide range of topics, and involves a very broad survey of the principles that underlie equitable estates. Briefly it may be said that express trusts rely for their creation upon the specific recitals of a deed, will, or other written instrument, while the latter are the mere creatures of legal construction or presumption. Implied trusts may, in turn, be divided into two general classes: First, Those that rest upon the presumed intention of the parties; Second, Those which are independent of any such express intentions, and are forced upon the conscience of the party by operation of law.¹⁷¹ These implied trusts are otherwise designated as resulting where a beneficial interest does not accompany the legal title. Familiar instances arise wherever a conveyance is taken in the name of one person, and the consideration is paid by another. In such cases the law raises a resulting trust in favor of the party advancing the consideration.

Still another phase of these implied trusts must be noted. I refer to constructive trusts. These never repose upon the intention of the party, but are thrust upon the trustee through reasons of natural equity and justice. More frequently they arise from the suspicion of active or constructive fraud, and they are formidable weapons under the equity jurisdiction for circumventing duplicity and unconscionable advantage.

Such expressions as "voluntary trusts," "precatory trusts," and "secret trusts" are occasionally met with. These will be disposed of as we proceed. But I may state that Story classifies precatory trusts with implied trusts, and that an "illegal" trust is a term that may justly characterize any of the categories where the circumstances are such as to repel the application of legal rules or formulas, provided such terms be used in such a connection as to convey an idea associated with attempted illegality. A man may be said to

¹⁷¹ 2 Story, Eq. Jur. 9th ed., sec. 1195.

attempt an illegal devolution of his property, and he may "attempt" to create a trust that the law will refuse to sanction; but it is a manifest perversion of language to speak of an "illegal" trust. The law knows nothing of any form of trust that is not purely legal, and whenever it countenances an "illegal" trust the judge who writes the opinion will have immortalized himself. To make this classification complete I should add that we have public and private trusts, and charitable and spendthrift trusts. But these names denote mere refinements, and for all practical purposes trusts may be said to fall into one of two categories — they are either express or implied.

What follows under this sectional treatment may be regarded as the amplification of the foregoing summary on the subject of classification.

a. *Express trusts.* "An express trust is simply a trust created by the direct and positive acts of the parties, by some writing, or deed, or will."¹⁷²

In another case it was said: "In order to constitute a trustee of an express trust, there must be some express agreement to that effect, or something which in law is equivalent to such an agreement. The case of factors and mercantile agents may or may not constitute an exception under the custom and usage of merchants. But in every case the trust must be expressed by some agreement of the parties, not necessarily, perhaps, in writing, but either written or verbal, according to the nature of the transaction."¹⁷³

"One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue upon such contract in his own name." Of course, this last expression must be taken in connection with the facts of the case; namely, that no promise is made to the plaintiff individually.¹⁷⁴

An express trust cannot be created by parol testimony — there are no contrariant decisions as to this proposition, and the confusion that infests the topic arises from the fact that

¹⁷² Weaver v. Trustees, etc., of Wabash, etc., Canal Co. 28 Ind. 112.

¹⁷³ Robbins v. Deverill, 20 Wis. 142.

¹⁷⁴ Rollins v. Fuller, 31 Ind. 255.

in many instances there is an utter failure to observe the radical distinction between express and resulting trusts. A chancellor will sometimes decree a resulting trust on the strength of parol testimony, while the former are strictly of documentary creation.¹⁷⁵

The nature of an "express trust" and the classes of persons embraced within the statutory phrase "trustees of an express trust," were determined upon great consideration by the New York Court of Appeals, in the leading case of *Considerant v. Brisbane*, 22 N. Y. 389, Judge Denio dissenting.

The prevailing opinion in that case says: "It is intended manifestly to embrace not only formal trusts declared by deed *inter partes*, but all cases in which a person acting in behalf of a third person enters into a written express contract with another either in his individual name, without description, or in his own name expressly for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another."¹⁷⁶

It has been held that assignees for the benefit of creditors, or in bankruptcy, are entitled to sue as "trustees of an express trust."¹⁷⁷

So of an agent who takes a policy of life insurance in his own name for a known, though unnamed principle.¹⁷⁸ Where a policy of insurance was issued to a party, payable "to whom it may concern," it was held that the person to whom it was issued might sue as a trustee of an express trust.¹⁷⁹ Commission merchants, insuring goods consigned to them to be sold on commission, may sue on the policy as trustees of an express trust.¹⁸⁰ Trustees named in a subscription paper, for the purpose of an action against the subscribers are trustees

¹⁷⁵ *Philpot v. Penn.* 91 Mo. 38; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 601; *Bates v. Kelley*, 80 Ala. 142; *United States Bank v. Carrington*, 7 Leigh, 566.

¹⁷⁶ See, also, *N. W. Conference v. Myers*, 36 Ind. 375.

¹⁷⁷ *Ogden v. Prentice*, 33 Barb. (N. Y.) 160.

¹⁷⁸ *Pitney v. Glens Falls Ins. Co.* 65 N. Y. 6.

¹⁷⁹ *Walsh v. Washington Ins. Co.* 32 N. Y. 427.

¹⁸⁰ *Waring v. Indemnity Fire Ins. Co.* 45 N. Y. 606.

of an express trust.¹⁸¹ A guardian of an infant, appointed by the probate court, is not a trustee of an express trust within the meaning of this section.¹⁸² The trustee of an express trust may maintain an action to prevent waste or trespass upon the land held in trust, or to recover possession thereof, without joining with him the *cestui que trust*; and should he refuse to do so, his *cestui que trust* may compel him by action to do so.¹⁸³ Savings banks are trustees for the depositors, within the meaning of this section, and not their debtors. A deposit of money constitutes an express trust.¹⁸⁴

b. *Executory and executed trusts.* Executory trust is a species of trust that requires something to be done before it takes effect. All trusts are in some sense executory, because a trust cannot be executed except by conveyance, and therefore, there is always something to be done. But in equity an "executory" trust occurs where the author of the trust has left it to be made out from general expressions what his intention is; and an executed trust is where there is nothing to be done but to take the limitations given and convert them into a legal estate. The trust is "executed" when the limitations of the equitable interest are complete and final; in an executory trust, the limitations of the equitable estate are not intended to be complete and final, but merely to serve as instructions for perfecting the settlement at some future time. Equity has ample jurisdiction to modify executory trusts in order to effectuate the intentions of the "donor" or "founder."¹⁸⁵

It should be added that an executed trust is one that is in such a perfect state of completion that nothing remains to be done to perfect it.¹⁸⁶

c. *Of so called "illegal" trusts.* The principle is that where several trusts are created by a will, which are independent of each other, and each complete in itself, some of which are lawful and others are unlawful, and which may be separated

¹⁸¹ *Hutchins v. Smith*, 46 Barb. 235; *Slocum v. Barry*, 34 How. Pr. 320.

¹⁸² *Fox v. Minor*, 32 Cal. 111.

¹⁸³ *Tyler v. Houghton*, 25 Cal. 26.

¹⁸⁴ *Burke v. Badlam*, 57 Cal. 594;

602; *Zuck v. Culp*, 59 Id. 142; *Rice*, Col. Code Pro. sec. 5.

¹⁸⁵ 2 *Pomeroy*, Eq. Jur., sec. 1000; *Lewin on Trusts*, 4; *Dennison v.*

Goehring, 7 Pa. St. 177.

¹⁸⁶ 4 *Kent*, 304.

from each other, the illegal trusts may be cut off, and the legal ones permitted to stand. This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work an injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. The rule, as applied in all reported cases, recognizes this limitation, that when some of the trusts in a will are legal, and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all the trusts may be construed together and all must be held illegal, and must fall.¹⁸⁷

It may be regarded as settled in Pennsylvania, that a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality or hostility to the existing form of government. A man may do many things while living which the law will not do for him after he is dead. He may deny the existence of a God and employ his fortune in the dissemination of infidel views, but should he leave his fortune in trust for such purposes, the law will strike down the trust as *contra bonos mores*. We need not elaborate this question nor extend the illustrations. The whole subject is thoroughly discussed in a number of cases which fully sustain the principle above stated.¹⁸⁸

d. *Implied trusts*. Express trusts are created by the action of the parties while implied trusts result by construction of law, and usually rest upon the presumed intent of the parties or are enforced upon the conscience by operation of law.¹⁸⁹ Implied trusts arise where the intent to create is a logical

¹⁸⁷ *Manice v. Manice*, 43 N.Y. 303; *Van Shuyver v. Mulford*, 59 N. Y. 426; *Knox v. Jones*, 47 N. Y. 389; *Benedict v. Webb*, 98 N. Y. 460; *Kennedy v. Hoy*, 105 N. Y. 135; 6 Cent. Rep. 805.

¹⁸⁸ See *Updegraph v. The Com-*

monwealth, 11 S. & R. 394; *Vidal v. Girard's Executors*, 2 How. 127; *Zeisweiss v. James*, 13 P. F. Smith, 465; *Rice's Probate Law*, 543.

¹⁸⁹ 2 Story Eq., sec. 1195; 1 Pomeroy Eq., sec. 155; 2 Id., sec. 1030, cases.

inference on the language of the instrument. Thus, if A. gives property to B. "not doubting" or "hoping" or "entreating" that B. "will employ it for the benefit of C.," a trust is implied in favor of C. the execution of which C. is at liberty to enforce, though it be given in this precatory form.

They are also denominated "precatory trusts."¹⁹⁰

"One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts *in invitum*, is when a party receives money which he cannot conscientiously withhold from another party."¹⁹¹ And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or *cestui que trust*."¹⁹²

Mr. Pomeroy says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, or through any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have any legal estate therein, and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder until a purchaser in good faith, and without notice, acquires a higher right and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed '*ex maleficio*' or '*ex delicto*,' are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."¹⁹³ A confidential relation is not necessary to

¹⁹⁰ 2 Story Eq. Jur., sec. 64.

¹⁹¹ Story Eq. Jur., sec. 1255.

¹⁹² Id. 1258; Hill, Trustees, 222; Whitley v. Foy, 59 N. C. 34, 78 Am. Dec. 236; Taylor v. Plumer, 3 Maule & S. 562; Knatchbull v.

Hallett, L. R. 13 Ch. Div. 696; People v. City Bank of Rochester, 96 N. Y. 32; Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co. 104 U. S. 54 26 L. ed. 693.

¹⁹³ Pom. Eq. Jur. 1053.

establish such trust, and there is no good reason why the owner of property taken and converted by one who has no right to its possession should be less favorably situated in a court of equity, in respect to his remedy (at least for the purpose of recompense or indemnity), than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. "The beautiful character — pervading excellence, if one may say so — of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the varying form and pressure of each particular case in all its complex habitudes."

In *Wheeler v. Reynolds*, 66 N. Y. 227, it was said: "If, in the case under consideration, the defendant at the sale had declared that he was bidding in the property for the plaintiff, and had thus induced other persons to refrain from bidding, and purchased the property for less than its value, a case would probably be made for holding him as trustee, *ex maleficio*, of the plaintiff."

e. *Resulting trusts*. "The general principles of equity and good conscience applied to certain situations and acts of the parties are used to raise presumptions of intentions, and to impress property with trusts, and to clothe one party with the character and obligations of a trustee, and another with the rights and privileges of a *cestui que trust* for the purpose of securing honesty and fair dealing among mankind, and to prevent fraud and injustice. The statute referred to was never intended to interfere with the application of these equitable and benign principles; but it was designed to prevent fraud and perjuries by prohibiting the creation of trusts relating to real estate dependent solely upon mere verbal or parol conversations or agreements."¹⁹⁴

In *Dyer v. Dyer*, 2 Cox. 92; 1 Lead. Cas. Eq. 237, Chief Baron Eyre stated the rule as follows: "It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being a child, or children of the purchaser,

¹⁹⁴ Church, C. J., in *Foote v. Bryant*, 47 N. Y. 544.

is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called into question, namely, that such circumstances shall rebut the resulting trust, and that it shall do as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without any certain guides."

Where an estate is conveyed in trust for a particular and temporary purpose, not requiring the whole of the estate, a resulting trust generally arises in favor of the grantor, or his heirs-at-law, in the remainder, after the original purpose is accomplished.¹⁹⁵ Whether a resulting trust should be declared depends largely upon the intention of the grantor, and in order to determine that intention, resort may be had to the entire instrument with the aid of such evidence as can lawfully be derived from the surrounding circumstances.

A resulting trust is not created in favor of one who pays, directly or indirectly part of the purchase money for land conveyed to another, unless such payment is made for some specific or distinct portion of the estate.¹⁹⁶ Generally the insuperable difficulty, in cases where a misappropriation of money is alleged, arises from the failure to identify and follow it in its transformation into other property. This difficulty is one of fact and not of law, and the oft asserted dictum that money has no "*ear mark*" must be understood as predicated only of an undivided and undistinguishable mass

¹⁹⁵ Story, Eq. Jur., sec. 1193 a.

¹⁹⁶ McGowan v. McGowan, 14 Grey (Mass.), 119.

of current money.¹⁹⁷ Although money has no ear mark it may be followed onto the land where it has been invested, in case where the purchaser stood as trustee on relation to the fund. The trustee is not permitted to defeat the claim upon the land, so long as he continues to hold the title, by proving only that he contributed to the purchase money and mingled his own money with that of the plaintiffs.¹⁹⁸ This doctrine has many vindications in American law. Thus, in *Day v. Roth*, 18 N. Y. 448, the plaintiff's money, held by one of the defendants for investment, was used in the purchase of land, which was conveyed to one of the other defendants with full knowledge of the transaction, and it was held that the fund was impressed with all the characteristics of a resulting trust and that the plaintiff had an undoubted right to follow the claim so long as it could be traced into whatsoever hands it might come. A mere change of property from one form to another cannot divest the owner of his rights so long as it is capable of identification.¹⁹⁹

In *Wallace v. Duffield*, *supra*, Gibson, Justice, writing for affirmance, said that when a trustee purchases with the trust fund and takes the conveyance in his own name, there is, properly speaking, no resulting trust, although it is generally so called; for there is in equity a very substantial difference between them, both in the quality and extent of the relief that can be called for. In the former the trustee will be compelled to execute the trust by a conveyance of the land. In the latter, chancery will raise the money out of the land by a sale of the whole, or such part of it as may be necessary to produce the sum withdrawn; and this mode is peculiarly convenient where only part of the consideration has been taken from the trust fund.²⁰⁰ In fact, the general laws of agency may be appealed to for the purpose of enforcing the same doctrine as it is an elementary rule that when the money of the principal has been wrongfully

¹⁹⁷ *Taylor v. Plummer*, 3 M. & S. 562.

¹⁹⁸ *Wallace v. Duffield*, 2 S. & R. 521; *Dey v. Dey*, 2 P. Wms. 412.

¹⁹⁹ *McLarren v. Brewer*, 51 Me. 402.

²⁰⁰ See, also, *Olliver v. Piatt*, 3 How. 333; *Kirkpatrick v. McDonald*, 11 Pa. St. 387; *Cheney v. Gleason*, 117 Mass. 557; *Adam's Eq. 33*, note; 2 *Story's Eq. Juris.*, sec. 1258.

invested by the agent in land, equity will burrow into the transaction and compel the legal owner, charged with notice, to accept the relation of a trustee with all of the liabilities that apply to that position.²⁰¹

When one makes an oral contract with another that the latter shall buy land, on joint account, and he, in violation of the contract, takes the deed to himself, no trust results in favor of the former as to one-half of the land, unless it is shown that he furnished the money for the one-half — in other words, that it was bought with his money.²⁰² A *resulting trust* depends upon the fact that the money of the person claiming it was used in the purchase, and it cannot be raised by any future payments or tender. "The trust," says Chancellor Kent, "results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of the money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever."²⁰³

A resulting trust will not be altered, and the court will not assist the purchaser, where the purchase is made with a view to contravene public policy or accomplish an illegal purpose.²⁰⁴

Resulting trusts do not arise from parol agreements, but spring from the actions and relations of the parties.²⁰⁵ And in all instances such trusts may be established by parol evidence.²⁰⁶ And it is an indisputable rule that the Statute of Frauds will never be allowed to apply to any trust arising by operation of law. Equity never allows itself to be

²⁰¹ Story Agency, sec. 229.

²⁰² Collins v. Sullivan, 135 Mass. 461; Dudley v. Bachelder, 53 Me. 403.

²⁰³ Botsford v. Burr, 2 Johns. Ch. 405; Richards v. Manson, 103 Mass. 482.

²⁰⁴ Whaley v. Whaley; Milner v. Freeman, 40 Ark. 62; F. Kenedy v. Keating, 34 Mo. 25; Nestal v. Schmid, 29 N. J. E. 460; Burden v. Sheridan, 36 Ia. 125; Pearson v. East, 36 Ind. 28; Torey v. Cameron, 73 Tex. 583; McDevitt v. Frantz,

85 Va. 740; Six v. Shaner, 26 Md. 415; Ward v. Matthews, 73 Cal. 13; Green v. Dietsch, 114 Ill. 636; Wiggin v. Wiggin, 58 N. H. 235; Powell v. Powell, 114 Ill. 329; Stuckey v. Stuckey, 30 N. J. Eq. 546.

²⁰⁵ Duffy v. Masterson, 44 N. Y. 557; Smith v. Hollenback, 51 Ill. 223; Lynn v. Lynn, 27 Md. 547; Hidden v. Jordan, 21 Cal. 92.

²⁰⁶ Smitheal v. Gray, 1 Humph. 491; Groesbeck v. Seeley, 13 Mich. 329; Morgan v. Clayton, 61 Ill. 35.

defeated in its action by a statute that was designed merely to prevent a fraud.²⁰⁷

Laches as affecting resulting trusts. As a general rule mere lapse of time is not a bar to the enforcement of a resulting trust assuming that a reasonable excuse is given, and there has been no adverse holding of the property.²⁰⁸ But this proposition is not without dissent. It may well be that by the long lapse of time such as would constitute gross laches, the court would decline to recognize the existence of a resulting trust, even at the instance of a defrauded beneficiary. One must not slumber on his rights but act promptly on the discovery of wrong-doing.²⁰⁹ As to the time when a resulting trust springs into being it may be said that when the papers or muniments of title of the property impressed with the trust pass to the new grantee, the trust results at the very inception of the title.²¹⁰ A father purchasing with funds belonging to his children, and taking a deed in his own name, will find himself the trustee of a resulting trust, and be held in that capacity.²¹¹

f. Constructive trusts. This particular species of trust estate is invariably grounded on fraud. Hence the equity jurisdiction has always held that parol evidence was admissible to establish such a trust. The fraud may be either actual or presumed. Beach, in his recent elaborate work on Equity Jurisprudence, says: "Rightly understood, a constructive trust is only a mode by which courts of equity work out equity, and prevent or circumvent fraud and overreaching."²¹²

²⁰⁷ *Osborne v. Endicott*, 6 Cal. 149; *Williams v. Hollingsworth*, 1 Strobh. Eq. 103; *Irwing v. Ivers*, 7 Ind. 308.

²⁰⁸ *Dow v. Jewel*, 18 N. H. 340; *Harris v. McIntire*, 118 Ill. 275.

²⁰⁹ *Brown v. Guthrie*, 27 Tex. 610; *Midmer v. Midmer*, 26 N. J. Eq. 299; *King v. Pardee*, 96 U. S. 90.

²¹⁰ *Holliday v. Shoop*, 4 Md. 59; *Dudley v. Bosworth*, 10 Humph. 9; *Pinnock v. Clough*, 16 Vt. 500; *Lehman v. Lewis*, 62 Ala. 129; *Rob-*

erts v. Ware, 40 Cal. 634; *Remington v. Campbell*, 60 Ill. 516; *Gee v. Gee*, 32 Miss. 190.

²¹¹ *Musham v. Musham*, 87 Ill. 80; *Robinson v. Robinson*, 22 Ia. 427; *Overseers v. Bank*, 2 Gratt. 544; *Hunter v. Yarborough*, 92 N. C. 68; *Portland & H. H. S. Co. v. Locke*, 73 Me. 370 *Allen v. Russell*, 78 Ken. 105.

²¹² *Beach, Eq. Jur.*, sec. 226; citing *Perry v. Jackson*, 85 Ala. 67.

A constructive trust is one which the court creates by a legal construction put upon certain acts of the parties, even in cases where the parties themselves had no intention of creating a trust. It frequently arises from some actual or constructive fraud, in which case it is known as a *trust ex maleficio*.²¹³

Constructive trusts are largely the creation of equity. They are frequently imposed upon a party without his consent and sometimes without his knowledge, and in many instances their creation is inspired by the fraudulent acts of the trustee.²¹⁴ Trustees, by operation of law, are such as are not declared by a party at all either directly or indirectly, but result from the effect of a rule of equity, and are either resulting trusts — as where an estate is devised to A. and his heirs upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favor of the testator's heirs — or of constructive trusts, which the court elicits by a construction put upon certain acts of parties.²¹⁵ As regards their creation, trusts are either express, resulting or constructive.²¹⁶ The first cannot be created by parol — only by instrument in writing,²¹⁷ while the distinguishing characteristic of a resulting trust is the active presence of the presumption that the beneficial ownership of the estate resides with the party who furnished the money for its purchase.²¹⁸

g. Voluntary trusts. A voluntary trust is an obligation springing from the personal confidence reposed in the donee, and voluntarily accepted by him as an obligation of friendship or duty or interest. Frequently a mixture of all these considerations operates to fasten the acceptance. An involuntary trust, like an implied trust, arises by operation of law whenever the facts in the case warrant its assertion.

§ 222. Charitable trusts. Under the common law the statute of Elizabeth was largely relied upon in determining the extent and nature of a charitable devise, but to guard against

²¹³ Perry on Trusts, 527; Bisph. Eq., sec. 91; 1 Pom. Eq. Jur., sec. 155; 2 Id., sec. 1044.

²¹⁴ 1 Perry on Trusts, 16.

²¹⁵ 1 Lewin, Trusts. 108.

²¹⁶ Bisph. Eq., secs. 78-79.

²¹⁷ Adams v. Adams, 79 Ill. 517.

²¹⁸ Story, Eq. Jur., sec. 1201.

improvident alienation of property, the celebrated Statutes of Mortmain and Charities, enacted in the time of George the Second, were devised as a means of restricting such inequitable transfers. Neither of these famous statutes has been adopted in this country, *in extenso*, although certain features from both have from time to time appeared in our variant legislation.²¹⁹ And it may be confidently affirmed that the test of a legal public charity is "the object sought to be attained." A charitable use may be well defined as "a gift to a general public use, which extends to the poor as well as to the rich."²²⁰ It may be, and frequently is, vested in a municipal corporation, empowered by its charter to so act, and in such case the municipality may be compelled to execute the trust.²²¹ A public or charitable trust may be indefinite in duration, and the beneficiaries under it may be selected by trustees, but if too remote in its contingency it is invalid,²²² and it has been held that it is essential to a charitable devise that the beneficiaries should to some extent be indefinite.²²³

a. *The Statute of 43 Elizabeth.* The plain object of the Act of 43 Eliz. is to place in commission a troublesome branch of the royal prerogative, and to vest the commissioners with power to institute inquests of office, or by other means to discover charities, or the abuse or misapplication of charities, and to authorize the board to exercise the same reach of discretion over such charities as the crown possessed, subject, however, to a revising and controlling power in the lord chancellor; not a mere judicial power, but a ministerial legislation and absolute power; a power, however, secondary or appellate in its nature, not original. This controlling power being absolute and final, soon swallowed up its parent, and became original and absolute. One judge admitted the precedent of an original bill in a charity case, a second judge satisfied his scruples upon that precedent, and other judges following regarded it as a settled practice. But in whatever way the power is exercised, whether as original

²¹⁹ See *Attorney-General v. Stewart*, 2 Meriv. 143.

²²² *Kent v. Dunham*, 142 Mass. 216.

²²⁰ *Perin v. Cary*, 65 U. S. 506.

²²³ *Fontaine v. Ravenel*, 58 U. S.

²²¹ *Peynado v. Peynado*, 82 Ky. 5. 369.

or appellate, no other authority for its exercise has ever been claimed by the chancellor but the 43d Elizabeth.²²⁴

The provisions of this once celebrated statute are not generally recognized in this country, although the courts of Ohio, Connecticut and Pennsylvania, Maine and New Jersey are somewhat committed to a recognition of its main objects.²²⁵ It has been expressly abolished in New York;²²⁶ in Michigan;²²⁷ in North Carolina,²²⁸ and in Virginia.²²⁹ Alabama, Georgia, Indiana, Maryland and Wisconsin are also included in this list.²³⁰

b. *What is a charitable trust?* It is well settled that any purpose is charitable in the legal sense of the word, which is within the principle and reason of this statute, although not expressly named in it; and many objects have been upheld as charities, which the statute neither mentions nor distinctly refers to. Thus, a gift "to the poor" generally, or to the poor of a particular town, parish, age, sex, race or condition, or to poor emigrants, though not falling within any of the descriptions of poor in this statute, is a good charitable gift.²³¹ So, gifts for the promotion of science, learning and useful knowledge, though by different means and by different ways from those enumerated under the second class; and gifts for bringing water into a town, for building a town-house, or otherwise improving a town or city, though not alluded to in the third class, have been held to be charitable.²³² By modern decisions in England, gifts

²²⁴ *Inglis v. The Trustees of The Sailors' Snug Harbor*, 3 Pet. 617.

²²⁵ See *Brewster v. McCall*, 15 Conn. 274; *Howard v. American Peace Society*, 49 Me. 288; *Hesketh v. Murphy*, 35 N. J. Eq. 29; *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 417; *Miller v. Teachout*, 24 Ohio St. 533.

²²⁶ *Cottman v. Grace*, 112 N. Y. 299.

²²⁷ *Newark M. E. Ch. v. Clark*, 41 Mich. 741.

²²⁸ *State v. Gerard*, 2 Ired. Eq. 210.

²²⁹ *Gallego v. Attorney-General*, 3 Leigh, 450.

²³⁰ *Williams v. Pierson*, 38 Ala. 299; *Adams v. Bass*, 18 Ga. 130; *State v. Warren*, 28 Md. 353; *Heiss v. Murphey*, 40 Wis. 292; *Grimes v. Harmon*, 35 Ind. 198.

²³¹ *Saltonstall v. Sanders*, 11 Allen, 455-461, and cases cited; *Magill v. Brown*, Brightly, 405, 496; *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294; *Chambers v. St. Louis*, 29 Mo. 543.

²³² *American Academy v. Harvard College*, 12 Gray, 594; *Drury v. Natick*, 10 Allen, 177-182, and authorities cited.

towards payment of the national debt, or "to the Queen's chancellor of the exchequer for the time being, to be applied for the benefit and advantage of Great Britain," are legal charities.²³³

In *Gould v. Washington Hospital for Foundlings*, 95 U. S. 311; 24 L. ed. 450, Mr. Justice Swayne said: "A charitable trust, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing or well-being of social man."

A more concise and practical definition is probably: "A gift to a general public use, which extends to the rich as well as to the poor."²³⁴

Mr. Justice Gray, in the case of *Jackson v. Phillips*, 14 Allen, 556, has given a definition which seems to include all the facts and circumstances and all varieties of charity, under the law, and leaves nothing to be added. In his words "a 'charity' in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, or by relieving their bodies from disease, suffering or constraint, or by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government. It is immaterial whether the purpose is called 'charitable' in the gift itself, if it is so described as to show that it is charitable in its nature." Trusts for the support of public worship and religious instruction have always been held charitable. In *Perry on Trusts*, sec. 701, referring to the fact that the English statute (43 Eliz.), makes no reference to religious use, except the "repair of churches," it is said: "But in a Christian community of whatever variety of faith or form of worship there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spread and teaching of Christianity, or for the convenience or support of

²³³ *Tudor on Charitable Trust* (2d ed.), 14, 15, and cases cited.

²³⁴ *Coggeshall v. Pelton*, 7 Johns. Ch. 294, 2 N. Y. Ch. L. ed. 297;

Mitford v. Reynolds, 1 Phil. Ch. L. 91; *Perin v. Carey*, 65 U. S., 24 How. 506, 16 L. ed. 701.

worship, or of the ministry, have been held charitable.” Mr. Pomeroy says: “The support and propagation of religion is clearly a ‘charitable use.’ This includes gifts for the erection, maintenance and repair of church edifices, the maintenance of worship, the support of clergymen, the promotion and promulgation of religious doctrines and beliefs, in any manner, by the church or by associations, the aid of missionary, Bible and other religious societies, and all other objects and purposes which are really religious.”²³⁵ Adopting the language of Lewis, Ch. J., in the case of *Price v. Maxwell*, *supra*: “A charitable use is not always a religious one, but we know of no religious use which could be regarded at all free from superstition that is not included in the definition of a ‘charitable use.’” Gifts for the erection of a house for public worship, or for the use of the ministry, constitute a public charity, when it appears to be some benefit to be conferred upon or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons.²³⁶

c. *Said to be favored in law.* By the law of many States, as by the law of England, gifts to charitable uses are highly

²³⁵ 2 Pom. Eq. Jur., sec. 1021.

²³⁶ *Potter v. Thornton*, 7 R. I. 252; *Johnson v. Mayne*, 4 Iowa, 180; 2 Perry, Trusts, sec. 701; *Beckwith v. Rector of St. Philips' Parish*, 69 Ga. 564.

Gifts for the benefit of a religious denomination are held valid as charitable trusts. (*Sowers v. Cyrenius*, 39 Ohio St. 29, 40 Am. Rep. 418; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *First Univ. Soc. in North Adams v. Fitch*, 8 Gray, 421; *Atty.-Gen. v. Dublin*, 38 N. H. 459; *Atty.-Gen. v. Jolly*, 2 Strobb. Eq. 379; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401; *Quinn v. Shields*, 62 Iowa, 129, 49 Am. Rep. 141; *Dexter v. Gardner*, 7 Allen, 243; *Earle v. Wood*, 8 Cush. 430; *Magill v. Brown*, Brightly [Pa.] 347.)

Trusts for the building and repairs of churches, chapels, etc., are sustained as good charitable trusts. (*Brodie v. Chandos*, 1 Bro. Ch. 444, notes; *Sewell v. Crewe-Read*, L. R. 3 Eq. Cas. 60; *Cresswell v. Cresswell*, L. R. 6 Eq. Cas. 69. See Tysen, *Charitable Bequests*, chap. 8; *Pell v. Mercer*, 14 R. I. 415; *Cory Universalist Soc. Trustees at Sparta v. Beatty*, 28 N. J. Eq. 570.)

Or to maintain a preaching minister. (*Pember v. Kingston*, *Tot-hill*, 34; *Atty.-Gen. v. Cook*, 2 Ves. Sr. 273; Tyssen, *Charitable Bequests*, p. 135; *Williams v. Williams*, 8 N. Y. 525; *Wellbeloved v. Jones*, 1 Sim. & Stu. 40; *Preachers' Aid Soc. v. Rich*, 45 Me. 559.) There are many others, but these cases suffice to illustrate the doctrine.

avored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use. The most important distinction between charities and other trusts is in the time of duration allowed and the degree of definiteness required. The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, being a life or lives in being and twenty-one years afterwards; and if the persons to be benefited are uncertain and cannot be ascertained within that period, the gift will be adjudged void, and a resulting trust declared for the heirs at law or distributees. But a public or charitable trust may be perpetual in its duration, and may leave the mode of application and the selection of particular objects to the discretion of the trustees.²³⁷

It is said that gifts to public charity are highly favored by the law, and courts will uphold them if it can possibly be done. "This is a charity which a court of equity is bound to uphold if practicable," said Judge Foster, in *White v. Howard*, 38 Conn. 366. "Charities are highly favored in law, and they have always received a more liberal construction than the law allows to gifts to individuals."²³⁸ "Courts look with favor upon charitable gifts, and take especial care to enforce them and guard them from assault, and protect them from abuse."²³⁹ "Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish the intent of the donor; and a trust, which cannot be supported in ordinary cases, will be established and carried into effect where it is to support a charitable use."²⁴⁰ If it is once determined that the donor intends to create a public charity, very different rules from those which are applied in establishing private trusts will be applied, in order to effect the intent of the testator and establish the charity.²⁴¹

²³⁷ *Sanderson v. White*, 18 Pick. 333; *Odell v. Odell*, 10 Allen, 5, 6, and authorities cited; *Saltonstall v. Sanders*, 11 Allen, 446; *Lewin on Trusts*, c. 2.

²³⁸ 1 Story's Eq. Jur., sec. 1165.

²³⁹ *Perry on Trusts*, 630.

²⁴⁰ *Sanderson v. White*, 18 Pick. 333.

²⁴¹ *Perry on Trusts*, 629.

d. *Distinction between charitable and private trusts.* The requisites of a valid private trust, and those of a charitable use are materially different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified *cestui que trust*, clearly identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members and partaking of a *quasi* public character. Indeed, it is said a public charity begins where uncertainty in the recipient begins.²⁴²

When the object and the purposes for which a trust is intended to be created are determined to be charitable, very different rules from those that are applied in administering and establishing private trusts will be applied in order to give effect to the intention of the donor,—establish the charity. In a private trust if the *cestuis qui trustent* are so uncertain or are so incapable of taking, that they cannot be identified, or cannot, by legal or equitable proceedings, claim the benefit conferred upon them, the gift will fail, and revert to the donor, or his heirs; but, if a gift is made for a charitable purpose, it is immaterial that the *cestuis que trustent* are indefinite or uncertain, or that the trustee is uncertain or incapable of taking. Courts of equity look with favor upon all such trusts and endeavor to carry them into effect, if it can be done consistently with the rules of law. With regard to the origin and extent of the equitable jurisdiction over charitable trusts in this country, there is the utmost conflict of judicial utterances in the earlier cases. The opinion seems formerly to have prevailed that the peculiar equitable jurisdiction over charities, except where a trust, valid by the ordinary rules of law and equity, was created, was derived solely from the Statute of 43 Eliz, chap. 4. It was so held by the Supreme Court of the United State in the case of *Philadelphia Baptist Asso. v. Hart*, 17 U. S. (4 Wheat.) 1; 4 L. ed. 499; but in the case of *Vidal v. Girard*, 43 U. S. (2 How.),

²⁴² 2 Pom. Eq. Jur., sec. 1018; 2 Perry Tr., sec. 687; *Paley v. Umatilla County*, 15 Or. 172.

127; 11 L. ed. 205, the court had occasion to re-examine the question, and, after an able and exhaustive argument by eminent counsel, in a learned opinion delivered by Justice Story, practically overruled the case of *Philadelphia Baptist Asso. v. Hart*, and held that courts of equity have jurisdiction over charitable trusts as part of their ordinary jurisdiction over trusts, and independently of the Statute of Elizabeth.

The doctrine of this case has generally been recognized as the law wherever the system of charitable trusts has been accepted at all.²⁴³ It may then be stated, as a proposition supported by the great weight of authority in this country, that courts of equity, in the various States, when they are not prohibited by the Statute, exercise an original inherent jurisdiction over charitable trusts, and apply to them the rules of equity, together with such other rules as may be applicable under the laws of the several States, and this they do by virtue of their inherent powers, without reference to whether the Statute of Elizabeth has been adopted in their State. Many definitions or attempted definitions, of a "legal charity" are to be found in the books, only a few of which will be given here. Mr. Binney, in his great argument in the case of *Vidal v. Girard, supra*, defined a "pious" or "charitable" gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish."²⁴⁴

²⁴³ 2 Pom. Eq. Jur., sec. 1028, and note; 2 Perry Tr. 694; *Howe v. Wilson*, 91 Mo. 45.

²⁴⁴ Mr. Pomeroy, in speaking of the distinguishing features between charitable and private trusts, says, that in the case of the former, "not only may the beneficiaries be uncertain, but that even when the gift is made to no certain trustee, so that the trust, if private, would wholly fail, a court of equity will carry the trust into effect, either by appointing a trustee, or by acting,

itself, in place of a trustee." (2 Pom. Eq. Jur., secs. 1025, 1026. See *Brown v. Kelsey*, 2 Cush. 243; *Washburn v. Sewall*, 9 Metc. 280.

In the celebrated *Tilden Will Case*, 130 N. Y. 29, the New York Court of Appeals held that the charitable scheme attempted by the will of the testator was void for indefiniteness and uncertainty. A certain designated beneficiary is essential to the creation of the valid testamentary trust; and a trust without a beneficiary who can

e. *Judicial construction of charitable trusts.* In the case of a charitable gift, above all others, it is often said the construction should be such as will preserve rather than destroy the

claim the advantage of its provision is void and this objection is not obviated by vesting the trustees with the optional or discretionary power of creating a trust for the purpose of calling into being a beneficiary capable of receiving the inheritance. "If there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary, who can claim its enforcement, is void, whether good or bad, wise or unwise." (*Nichols v. Allen*, 13 Mass. 211, 212; *In re Jarman*, L. R., 8 Ch. Div. 584, 587; *Norris v. Thompson*, 4 C. E. Green, 507; *C. E. Green*, 498; *James v. Allen*, 3 Mer. 17; *Vessey v. Janson*, 1 Sim. & Stu. 69; *Williams v. Kershaw*, 5 L. J. [N. S.] Ch. 84; 5 Cl. & Fin. 111; *Ellis v. Selby*, 1 Myl. & Cr. 286; *Kendall v. Granger*, 5 Beav. 300, 302; *Thompson v. Thompson*, 1 Colby, 398; *Chamberlain v. Stearns*, 111 Mass. 267; *Holland v. Alcock*, 108 N. Y. 323; *Morice v. Durham*, 9 Ves. 399; *Omany v. Butcher*, T. & R. 260.)

In the language of Story: "Whenever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion or choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership — in all such cases, courts of equity will not create a trust from words of this character." (2 Story's Eq. Jur., sec. 1070.) The

rule, which we believe to be amply supported by the authorities, is thus laid down in *Hill on Trustees*, 119: "But any words by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, will prevent the subject of the gift from being considered certain." (See, also, *Knight v. Knight*, 3 Beav. 173; *Howard v. Carusi*, 109 U. S. 725; 2 Pom. Eq. Jur., secs. 1014-1017; *Williams v. Worthington*, 49 Md. 572.)

There is, in American courts, much diversity of decision upon the subject of charitable trusts. In express private trusts, there is not only a certain trustee who holds the legal estate, but there is a certain specified *cestui que trust*, clearly identified, or made capable of identification, by the terms of the instrument creating the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain — a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a *quasi* public character. (2 Pomeroy's Eq. Jur., sec. 1018.) In some of the States, the equitable system of distinctively charitable trusts is not recognized, and the courts apply only the rules applicable to express private trusts. In other States, the statute of Charitable Uses (43 Elizabeth, chap. 4), has been adopted or repealed, and thereby decisions have been influ-

gift.²⁴⁶ In many of the cases the word "benevolent" has been coupled with "charitable" or some equivalent word, or has been mentioned in connection with such public institutions as to show an intent to make it synonymous with charitable.²⁴⁷ In other cases, where a bequest for "benevolent" purposes contained no qualifying or explanatory words, the bequest has been held void for uncertainty.²⁴⁸ The decisions go upon the ground that the testator intended the word "benevolent" to be understood according to the technical construction which had been put upon it by the courts. But in many of the recent English cases a more reasonable construction in regard to technical language has been adopted. In *Jenkins v. Hughes*, 8 H. L. Cas. 571, the court said words of a technical kind are not necessarily to receive a technical meaning. In *Young v. Robertson*, 4 Macq. H. L. Cas. 314, 325, it was said the primary duty of a court, in the interpretation of wills, is to give each word employed, if it can with propriety receive it, the natural and ordinary meaning which it has in the vocabulary of ordinary life, and not to give words employed in that vocabulary an artificial, secondary, or technical meaning. In *Hall v. Warren*, 9 H. L. Cas. 420, it is laid down that, in construing the autograph of an illiterate man, the meaning of technical language may be disregarded;

enced. And, in other cases, local legislation, or supposed local policy, to more or less extent, enters into adjudications. In another, and, as believed, the larger portion of the States, the system of charitable trusts, as administered in the English Court of Chancery, in the exercise of its ordinary judicial power, prevails, with variation in regard to the element of certainty in the trustee and the object of the charity. A classification of the decisions in the several States will be found in 2 Perry on Trusts, sec. 748, in note, and 2 Pomeroy's Eq. Jur., sec. 1029.

²⁴⁵ *Saltonstall v. Sanders*, 11 Allen, 446, 455; *Whicker v. Hume*, 7 H. L. Cas. 154.

²⁴⁶ *Saltonstall v. Sanders*, 11 Allen (Mass.), 446; *Roch v. Emerson*, 105 Mass. 431; *Hill v. Burns*, 2 Wils. & Sh. 80; *Crichton v. Grieson*, 3 Bligh's N. R. 524; s. c. 3 Wils. & Sh. 329; *Ewen v. Bannerman*, 2 Dow. & C. 74; s. c. 4 Wils. & Sh. 346; *Miller v. Rowan*, 5 Cl. & F. 99; s. c. 2 Shaw & McL. 866; 2 Per. Tr., sec. 711 *et seq.*; 1 Jarm. on Wills, 211-215.

²⁴⁷ *James v. Allen*, 3 Mer. 17; *Morice v. Bishop of Durham*, 9 Ves. 399; s. c. 10 Ves. 522; *Attorney-General v. Haberdashers' Co.* 1 Myl. & K. 420; *Nash v. Morley*, 5 Beav. 177; *Chamberlain v. Stearns*, 111 Mass. 267.

but no word which has a clear and definite operation can be struck out. Judge Redfield, in commenting upon these cases, says they "evinced a determination not to allow technical rules of construction to overbear and break down all the better instincts and involuntary sentiments of common sense and the common experience of mankind, even in the construction of wills, and we hail the omen with no slight gratification."²⁴⁸

When property is conveyed to a religious corporation to promote the teaching of particular religious doctrines and the funds are attempted to be diverted to different doctrines, it is the duty of chancery to interfere.²⁴⁹

Equity will award the possession of the property to those who are the true adherents to the doctrines, teachings and faith of the church, and enjoin the seceders from the true faith of the church from in any manner interfering with them therein.²⁵⁰

f. *Not forfeited by non-user.* It has been so many times decided by the Pennsylvania courts that a conveyance of land to trustees for a charitable use does not create a conditional estate, but only a trust for the charitable use, not liable to be defeated by non-user or alienation, in the absence of an express condition that a mere reference to some of the authorities is sufficient.²⁵¹

²⁴⁸ 1 Redf. Wills (Ed. 1864), 429, note; Perkins v. Mathes, 49 N. H. 107, 110; Trustees v. Peaslee, 15 N. H. 319; Tilton v. Tilton, 32 N. H. 263; Goodhue v. Clark, 37 N. H. 525; Mathes v. Smart, 51 N. H. 438, 440; 1 Redf. Wills, 426, 442; Stokes v. Solomones, 9 Hare, 75; Hart v. Tulk, 2 DeG., M. & G. 311; Rice, Probate Law, 539.

²⁴⁹ Miller v. Gable, 2 Den. 492; Rosh's App., 69 Pa. 462, 8 Am. Rep. 275; Rottmann v. Bartling, 22 Neb. 375.

²⁵⁰ Rosh's App. and Rottmann v. Bartling, *supra*; Kniskern v. Lutheran Churches of St. John and St. Peter, 1 Sandf. Ch. 439, 7 L. ed. 388;

Grimes v. Harmon, 35 Ind. 198; State v. Farris, 45 Mo. 183; Kisor's App., 62 Pa. 428; Henderson v. Hunter, 59 Pa. 335; Feizel v. First German Soc. of M. E. Church, 9 Kan. 592; McKinney v. Griggs, 5 Bush. 401.

²⁵¹ Wright v. Linn, 9 Pa. 433; McKissick v. Pickle, 16 Id. 140; Griffith v. Cope, 17 Id. 96; Pickle v. McKissick, 21 Id. 232; Barr v. Weld, 24 Id. 84; Brendle v. Jackson Twp. German Ref. Cong., 33 Id. 415. Columbia First M. E. Church v. Old Columbia Public Ground Co. 103 Id. 608; Wilkes Barre v. Wyoming Historical & G. Soc. 134 Id. 616.

In the case of *McKissick v. Pickle*, it was said: "The grant being for a charity could not be forfeited for non-user nor for misuser, except under an express condition or contract, and although in the latter case it may, yet it must be clearly, expressly and strictly shown that the condition was broken."

g. *Rules as to religious associations.* Upon authority so general as to be beyond question it is held that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any member of the church or association, less than the whole, may not divest it therefrom. The following cases more or less directly sustain the rule, and are but a few of the many bearing on the question.²⁶²

In *App. v. Lutheran Congregation*, 6 Pa. 201, it is said: "It is the duty of the court to decide in favor of those whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared."²⁶² In deciding who is entitled to control the church proper where there is such a division, we must look to the situation when the dispute began. In *Roshi's Appeal*, citing the above authorities, it is said: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, and principles which

²⁶² *Kniskern v. Lutheran Churches of St. John and St. Peter*, 1 Sandf. Ch. 439, 7 L. ed. 388; *Atty.-Gen. v. Pearson*, 3 Meriv. 353; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick (Mass.) 172; *Hale v. Everett*, 53 N. H. 9; *Lawyer v. Ciperly*, 7 Paige (N. Y.), 281, 4 L. ed. 156; *Hartford First Bapt. Church v. Witherell* 3 Paige (N. Y.), 296, 3 L. ed. 159; *Harrison v. Hoyle*, 24 Ohio St. 254; *Field v. Field*, 9 Wend. (N. Y.) 401; *Gable v. Miller*, 10 Paige (N. Y.),

627, 4 L. ed. 1118, 2 Denio (N. Y.), 492; *Cincinnati M. E. Church v. Wood*, 5 Ohio, 284; *Happy v. Morton*, 33 Ill. 398; *Lawson v. Kolbenson*, 61 Ill. 407; *Dublin Case*, 38 N. H. 459; *Watson v. Jones*, 80 U. S., 13 Wall. 679, 20 L. ed. 666; *Fadness v. Braunberg*, 73 Wis. 257; *First Constitutional Presby. Church v. Congregational Soc.*, 23 Iowa, 567.

²⁶³ See also *McGinnis v. Watson*, 41 Pa. 9; *Sutter v. First Dutch Reformed Church*, 42 Id. 503.

were accepted among them before the dispute began are the standard for determining which party is right."

If, perchance, a bare majority of some Baptist church should determine on scriptural authority, their right to a plurality of wives, and, against the protests of a minority, devote the property of the church to the advocacy and practice of such a doctrine, under the claim that the church "owes no allegiance to any man or body of men," civil or ecclesiastical, except a majority of its members, the only redress of the minority would be to retire from the church, and leave the property to the majority for such a purpose. Such a surrender of civil rights is without support on any principle of natural justice, and we believe without the sanction of any judicial tribunal. It is said in Schnorr's Appeal, in a very similar connection that "the guaranty of religious freedom has nothing to do with the property. It does not guaranty freedom to steal churches."

h. *When charitable gifts will not be upheld.* Gifts for purposes prohibited by or opposed to the existing laws cannot be upheld as *charitable*, even if for objects which would otherwise be deemed such. The bounty must, in the words of Sir Francis More, be "according to the laws, not against the law," and "not given to do some act against the law."²⁵⁴ So Mr. Dane defines, as undoubted charities, "such as are calculated to relieve the poor, and to promote such education and employment as the laws of the land recognize as useful."²⁵⁵ Upon this principle, the English courts have refused to sustain gifts for printing and publishing a book inculcating the absolute and inalienable supremacy of the pope in ecclesiastical matters; or for the support of the Roman Catholic or the Jewish religion, before such gifts were countenanced by act of Parliament.²⁵⁶ And a bequest "towards the political restoration of the Jews to Jerusalem and to their own land," has been held void, as tending to create a political revolution in a friendly country.²⁵⁷ In a free republic, it is the right of every citizen to strive in a peaceable manner by vote, speech

²⁵⁴ Duke, 126, 169.

²⁵⁵ 4 Dane Ab. 237.

²⁵⁶ De Themmines v. De Bon-

neval, 5 Russ. 288; Tudor, 21-25, and cases cited.

²⁵⁷ Habershon v. Vardon, 4 De Gex & Sm. 467.

or writing, to cause the laws, or even the constitution, under which he lives, to be reformed or altered by the Legislature or the people. But it is the duty of the judicial department to expound and administer the laws as they exist. And trusts, whose express purpose is to bring about changes in the laws or the political institutions of the country, are not charitable in such a sense as to be entitled to peculiar favor, protection and perpetuation from the ministers of those laws which they are designed to modify or subvert.

A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in *Morice v. Bishop of Durham*, 9 Ves. 405, and 10 Ves. 541, that those purposes are considered charitable which are enumerated in the Statute of 43 Eliz. or which by analogies are deemed within its spirit or intendment — leaves something to be desired in point of certainty, and suggests no principle. Mr. Binney, in his great argument in the *Girard Will Case*, 41, defined a charitable or pious gift to be “whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense — given from these motives, and to these ends — free from the stain or taint of every consideration that is personal, private or selfish.” And this definition has been approved by the Supreme Court of Pennsylvania.²⁵⁸ A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the Supreme Court of the United States: “A gift to a general public use, which extends to the poor as well as to the rich.”²⁵⁹ A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or

²⁵⁸ *Price v. Maxwell*, 28 Penn. (N. Y.) 294; *Mitford v. Reynolds*, 1 State R. 35. Phil. Ch. 191, 192; *Perin v. Carey*,

²⁵⁹ *Jones v. Williams*, Ambl. 652; 24 How. 506.
Coggeshall v. Pelton, 7 Johns. Ch.

otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

i. *Doctrine of charitable uses rejected in certain States.* While it has been said that charitable trusts are favored in equity, and while it would seem that such trusts would appeal with peculiar force to the indulgence of any court, it still is true that the doctrine is entirely repudiated in several States. New York seems foremost in this repudiation, and the celebrated case of *Holland v. Alcock*, 108 N. Y. 312, collates and classifies many of the preceding decisions on the subject.²⁶⁰ In the case last cited both Marshall and Story were of the opinion that the power of the English Court of Chancery, in relation to charities, was derived from the Statute of 43d Elizabeth. This doctrine was denied by Chancellor Walworth, of New York, in *Potter v. Chapin*, 6 Paige, 649, and the Supreme Court of the United States subsequently adopted his view in *Vidal v. Girard*, 2 How. 196. As a result, it now appears, that the English Court of Chancery received its jurisdiction over charities from the common law, and not from the statute referred to.

In Illinois the Statute of Elizabeth is said to be in force, and courts will carry out the intention of the donor in establishing a charity. They disclaim the power to change the object, *cy pres*, and decide that a charity must be accepted as given. All of which is undoubted law; but from the principles of interpretation laid down there is no reason why they should not carry out the intention of the donor *cy pres*, if there fail to be any objects of his charity, as originally given and administered. And this doctrine has been applied to a certain extent.²⁶¹

It would be quite inappropriate to now repeat the history of the contest in New York upon the question whether the English doctrine of charitable uses ever prevailed here. A general review of that contest was made by the late Judge

²⁶⁰ See also *Wilderman v. Baltimore*, 8 Md. 551; *Pringle v. Dorsey*, 3 S. C. 502; *Beekman v. Bonsor*, 23 N. Y. 298 (a peculiarly instruc-

tive case); *Baptist Asso. v. Hart*, 4 Wheat. 1.

²⁶¹ *Gilman v. Hamilton*, 16 Ill. 225; *Heuser v. Harris*, 42 Ill. 425.

Rapallo, in the recent case of *Holland v. Alcock*, 108 N. Y. 312; 11 Cent. Rep. 861, and his opinion leaves nothing to be added on that subject. That case leaves the doctrine no longer in doubt that to constitute a valid trust there must be a defined beneficiary; and the absence of such is, as a general rule, fatal to the validity of a testamentary trust.

Referring to what was maintained in an early case that the system was inherited as a branch of the common law, he said: "That particular postulate being finally overthrown and the British statutes having been repealed at the very origin of our State government, we should be a civilized State without provisions for charity if we had not enacted other laws for ourselves. But charity, as a great interest of civilization and christianity, has suffered no loss or diminution in the change which has been made. The law has been simplified and that is all. Instead of the huge and complex system of England, for many generations the fruitful source of litigation, we have substituted a policy which offers the widest field for enlightened benevolence. The proof of this is in the great number of charitable institutions scattered throughout the State. It is not certain that any political State or society in the world offers a better system of law for the encouragement of property limitations in favor of religion and learning, for the relief of the poor, the care of the insane, the sick and the maimed, and the relief of the destitute, than our system of creating organized bodies by the legislative power, and endowing them with the legal capacity to hold property which a private person or a private corporation has to receive and hold transfers of property. Under this system many doubtful and obscure questions disappear and give place to the more simple inquiry whether the grantor or deviser of a fund designed for charity is competent to give; and whether the organized body is endowed by law with capacity to receive and hold and administer the gift." The doctrine of charitable uses does not prevail in New York.²⁶²

²⁶² *Holmes v. Mead*, 52 N. Y. 232; *Yates v. Yates*, 9 Barb. (N. Y.) 341; *Ayers v. Methodist Epis. Church Trustees*, 3 Sandf. (N. Y.) 351; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 N. Y. 584; *Adams v. Perry* 43 N. Y. 487; *Holland v. Alcock*, *supra*.

j. *The doctrine of cy pres examined.* It remains to examine the question as to how far a court will execute a trust *cy pres*. The leading case in this country is that of *Jackson v. Phillips*, 14 Allen, 539, decided by the Massachusetts Supreme Court of Judicature in 1867. The opinion was by Chief Justice Gray, now of the Supreme Court of the United States, and is one of the most polished and scholarly attempts of that celebrated jurist. It would be utterly impossible at the present day for any text writer to enter upon an intelligent discussion of this subject without a careful study of this oft-quoted case, and a repeated reference to Judge Gray's opinion. As it is quite impossible to improve upon his elaborate diction I shall make extended extracts from his review, and not attempt a criticism of the conclusions reached. Perhaps it would be well to preface the discussion with the remark, that in general the doctrine of *cy pres* is only applied in cases of charitable trusts. It proceeds upon the theory that an intention is evinced to devote a certain fund to public charity — that for some supervening reason at the time the fund becomes available for the use of the charity designated it is found impossible to administer it — as where the corporate body, that represents the charity, has gone out of existence. Obviously the question then is what shall be done with the fund. The doctrine of *cy pres* says: "let us apply it to the next best thing," and accordingly it devotes it to some analogous charity. It is evident that in such a case there is great danger of foisting upon the testamentary intent a scheme that was never contemplated by the testator. And that the court is in effect making a will *pro tanto* for the late lamented that entirely ignores the claim of his kindred. It is said that the prejudice against the doctrine have been notorious in England for centuries, and that there is no reported case of controlling authority in this country which sustains the doctrine. With us it is quite generally repudiated, and has been apologized for and lamented over by several English judges of high repute. Wherever it has been administered and recognized, it has only been allowed to operate as to minor details — in cases where the substance of the charity could be respected, and the deficiencies were supplied only as to subordinate matters.

In *Jackson v. Phillips*, *supra*, one of the trusts was for the inflaming of public sentiment against the internal polity of some of the American commonwealths, thereby to secure the repeal of their laws in regard to the relations of master and servant, and for harboring persons who, in violation of those relations, abandoned the States wherein they existed. After the death of the testator, but while litigation upon his will was still in progress, the laws referred to were rendered inoperative by an amendment to the Federal Constitution; and the immediate purpose for which the bequest was made having failed, the fund was applied to the New England Branch of the American Freedmen's Union Commission. And it was there laid down that where a gift is made to a trustee for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, no intention being expressed to limit it to a particular institution or mode of application; and afterwards if either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund having once vested in the charity does not go to the heirs-at-law as a resulting trust, but is to be applied by the Court of Chancery in the exercise of its jurisdiction in equity, *cy pres*, or as near the testator's particular directions as possible, thereby to carry out his general charitable intent. Even when the trust is to be executed out of the State, chancery may appoint a trustee within the State to receive the bequest, or may order the fund or the profits arising from it to be paid from time to time to a trustee, in the place where the trust is to be executed. There seems to be "no valid reason why the judicial *cy pres* doctrine, as explained in *Jackson v. Phillips*, should not be approved in all those States wherein the Statute of Elizabeth has been decided to be in force, or where its principles have been adopted by the law of the State; in other words, in those States where the doctrine that indefiniteness of the object is no objection to a trust, provided it is for a charity, is recognized. This is the case in many States of the Union." And indeed it would seem that courts of equity have derived from the English common law, independent of the Statute of Elizabeth, the authority to enforce charities

when trustees competent to take the legal title are named, and the class to be benefited and the individuals to be designated by the trustees are ascertainable. Thus, it has been held, that in the general devolution upon the courts of California of all judicial power with respect to charities is included the power of *cy pres*, so far as it may be employed in directing the trustees under a will to carry into effect the general, lawful, and charitable intent, when the particular scheme is impracticable or has become unlawful. The existence of a judicial power to administer a charity *cy pres*, where the expressed intention of the founder cannot be exactly carried out, has been either countenanced or left an open question in all the New England States except Connecticut. In New Jersey the doctrine is favorably regarded. In Kentucky the Statute of Elizabeth is re-enacted. Grants and devises for charitable and educational purposes are declared valid, and the judicial doctrine of *cy pres* is fully applied. In another class of States, the doctrine of charitable trusts has never been adopted, or has been abolished, either by statutory prohibition of all uses and trusts where the trustee has no active service to perform, with a few specified exceptions, or by the provisions of the law against perpetuities, or by the general policy of the State legislation. And in those States charitable trusts do not exist except where they are merely the express private trusts permitted by the law, or in those particular instances authorized by statute. In this class are included New York, Wisconsin, Michigan, Maryland, North Carolina, Virginia, West Virginia. In all of these States a trust for charitable purposes would be upheld provided it possessed all the elements of a valid ordinary trust, a competent and certain trustee, certainty in the beneficiaries, and compliance with the laws against perpetuities.

The doctrine of *cy pres* as applicable to a court of equity includes two general clauses:

1. Where a gift is made to trustees for a general public charity, and the limitations of the trust are vague or imperfect.
2. When a charitable gift is made to trustees and the limitations which were originally clear and precise, have become

by lapse of time or other circumstances, impossible of strict execution.²⁶³

It is not every charitable gift falling within the general divisions above named which is enforced *cy pres*.

The exceptions are:

1. A gift with no general charitable intention to a specific object of charity that fails. When there is no general, but only a particular intention, the gift is at an end when that fails.²⁶⁴

2. A gift in trust to charity is not altered *cy pres* or the trust changed because the original limitations are become inexpedient; even though a decided benefit would arise from the alteration.²⁶⁵

3. A gift in trust to charity will not be altered *cy pres* because the duties imposed upon the beneficiaries are burdensome.²⁶⁶

4. Or the gift may not be a good charitable trust; as the jurisdiction of the Court of Chancery is a part of its ordinary trust jurisdiction existing before the Statute of Elizabeth, no power to appoint *cy pres* can be exercised if the gift be a bad trust through incomplete limitation, uncertainty, limitations impossible of ascertainment by a court, or by reason of an absence of tangible objects or otherwise.

5. But where a testator intends to benefit a society which has ceased to exist before the death of testator, the legacy is held to lapse, and no case arises to apply the case *cy pres*.²⁶⁷

²⁶³ Tudor, Charitable Tr. 260.

²⁶⁴ Atty.-Gen. v. Oxford, 1 Bro. Ch. 444, note, Anonymous, 2 Freem. 261; Cherry v. Mott, 1 Myl. & C. 123; Atty.-Gen. v. Whitely, 11 Ves. Jr. 251; Clark v. Taylor, 1 Drew, 642; Fisk v. Atty.-Gen. L. R. 4 Eq. 521; *Re Ovey*, L. R. 29 Ch. Div. 560; Carter v. Balfour, 19 Ala. 814; Russell v. Kellett, 3 Smale & G. 264; Sinnett v. Herbert, L. R. 7 Ch. 232; *Re White's Trust*, 55 L. J. Ch. N. S. 701; Lechmere v. Curtler, 24 L. J. Ch. N. S. 647.

²⁶⁵ Harvard College v. Society for Promoting Theological Education, 3 Gray (Mass.), 280; Atty.-Gen. v. Hartley, 2 Jac. & W. 382; Atty.-Gen. v. Mansfield, 2 Russ. 520.

²⁶⁶ American Academy of A. & S. v. Harvard College, 12 Gray (Mass.), 595; Atty.-Gen. v. Andrews, 3 Ves. Jr. 646; Atty.-Gen. v. Margaret & R. Professors, 1 Vern. 55; Atty.-Gen. Platt, Finch, 221; Atty.-Gen. v. Dean of Christ Church, Rep. Ch. Jac. 474.

²⁶⁷ Marsh v. Means, 3 Jur. N. S. 790; Langford v. Gowland, 3 Giff.

It is accordingly well settled by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs-at-law as a resulting trust, but is to be applied by the Court of Chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. In all the cases of charities which have been administered in the English Courts of Chancery without the aid of the sign manual, the prerogative of the king acting through the chancellor has not been alluded to, except for the purpose of distinguishing it from the power exercised by the court in its inherent equitable jurisdiction with the assistance of its masters in chancery.

As before intimated, Judge Gray's opinion leaves nothing whatever to be said upon that side of the subject. It is a sixty-page essay of exceptional merit, and in one sense is a mine of valuable information particularly as to the judicial construction of the famous Statute of 43 Elizabeth, so frequently referred to. I have already indicated the many obligations I am under to this celebrated opinion, and shall offer no further apology for the following extract:

"It is contended for the heirs-at-law, that the power of the English chancellor, when a charitable trust cannot be administered according to its terms, to execute it so as to carry out the donor's intention as nearly as possible — *cy pres* — is dervied from the royal prerogative or the Statute of 43 Elizabeth, and is not an exercise of judicial authority; that, whether this power is prerogative or judicial, it cannot, or, if it can, should not, be exercised by this court; and that the doctrine of *cy pres*, even as administered in the English chancery, would not sustain these charitable bequests since slavery has been abolished.

617; Fisk v. Atty.-Gen. L. R. 4 Eq. 29 Ch. Div. 560; Clark v. Taylor, 1 521; Broadbent v. Barrow, L. R. Drew. 642.

Much confusion of ideas has arisen from the use of the term *cy pres* in the books to describe two distinct powers exercised by the English chancellor in charity cases, the one under the sign manual of the crown, the other under the general jurisdiction in equity; as well as to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals, in order to avoid the objection of remoteness. It was of this last, and not of any doctrine peculiar to charities, that Lord Kenyon said, 'The doctrine of *cy pres* goes to the utmost verge of the law, and we must take care that it does not run wild;' and Lord Eldon, 'It is not proper to go one step farther.'²⁶⁸

The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual, are of two classes: the first of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it." The whole doctrine has repeatedly been condemned.²⁶⁹

In its origin and history, this jurisdiction was an exercise of prerogative power, and not of judicial.²⁷⁰ The application of the doctrine is unconstitutional in Massachusetts, where the legislative and judicial departments are carefully separated. *Cy pres* is fitted only for a government of men, and not for a government of laws.

There is a strong presumption against this doctrine because its administration in England has been notorious for

²⁶⁸ *Brudenell v. Elwes*, 1 East. 451; 5 C. 7 Ves. 390, 1 Jarman on Wills, 261-263; Sugden on Powers, ch. 9, sec. 9; *Coster v. Lorillard*, 14 Wend. (N. Y.) 309, 348.

²⁶⁹ *Brudenell v. Elwes*, 1 East. 451; *Mills v. Farmer*, 1 Meriv. 94; *Moggridge v. Thackwell*, 7 Ves. 87; *Cary v. Abbot*, 1b. 490; *Fontain v. Ravenel*, 17 How. 387; *Holland v. Peck*,

2 Ired. Eq. 261; *Beekman v. Bonsor*, 23 N. Y. 298.

²⁷⁰ *Baptist Association v. Hart*, 4 Wheat. 1; *Ayres v. Methodist Church*, 3 Sandf. (N. Y.) 351; *Andrew v. New York Bible, etc. Soc.* 4 Id. 156, 178; *White v. Fisk*, 22 Conn. 31; *Whitman v. Lex*, 17 S. & R. 88; *Dickson v. Montgomery*, 1 Swan (Tenn.), 348.

centuries; and by the Supreme Court of the United States it has been rejected, and it has been administered, as it is believed, in no reported case of authority by the courts of any State.

For a century, its existence has been apologized for and lamented by the English courts, and in most American courts it is denied and repudiated.

The doctrine of *cy pres* is nothing more than the rule of approximation or the carrying into effect the intent of the testator as near as possible although the beneficiary may be some other than the one named in the testamentary grant,²⁷¹ and if a literal execution of the testator's intent becomes inexpedient or impracticable, the court will attempt an approximation of the object.²⁷² The construction of a will *cy pres* is not generally adopted on behalf of charities and many courts regard the *cy pres* power with hostility.²⁷³ The Statute of Elizabeth and the Mortmain Acts were repealed in New York by legislation in 1788,²⁷⁴ and the courts of this State refuse to enforce the execution of a charitable use if in order to effect the intent of the testator resort must be had to the doctrine of *cy pres*.²⁷⁵ The *cy pres* power is totally at variance with the spirit of our institutions and should be denied all recognition.²⁷⁶ It has no standing in the practice of any court in this country and if allowed to operate as a rule of disposition the power resides in the State Legislature as representing the power formerly residing in the king.²⁷⁷ The favor shown to charities should not be carried to the point of overriding the plainly expressed limits of a gift.

Sometimes it is said that if there is a gift to charity and no specified object seems to have been in the contemplation of the testator or the particular object ceases to exist or fails, the court will execute the trust *cy pres* by applying the

²⁷¹ Potter v. Chapin, 6 Paige (N. Y.), 639.

²⁷² See Rice's Probate Law, 541-3; Inglis v. Sailors' Snug Harbor, 28 U. S. 99.

²⁷³ White v. Fiske, 22 Conn. 31; Lepage v. McNamara, 5 Ia. 124.

²⁷⁴ Bascom v. Albertson, 34 N. Y. 584.

²⁷⁵ Ayres v. Methodist Episcopal Ch. 3 Sandf. (N. Y.) 351.

²⁷⁶ Fountain v. Ravenel, 58 U. S. 384.

²⁷⁷ Whitman v. Lex, 17 S. & R. 93; Bartlet v. King, 12 Mass. 545.

fund to some other meritorious object, similar in its general scope to the object sought to be benefited by the testator or donor. But where the intent — and here comes the limitation on the general doctrine — too is to benefit some designated charity, and this intent cannot be accomplished, the gift wholly fails and the trust scheme must be abandoned.²⁷⁸ A legacy to a medical institution which is not a free school but an individual enterprise is not in any sense a gift to a public charity, and in case the beneficiary ceases to exist before the will takes effect the application of the doctrine of *cy pres* will be denied.²⁷⁹

Notwithstanding all that has been said and written in derogation of the *cy pres* power there is an abiding conviction that a court of equity, unless trammelled by precedent or adverse legislation, should in a proper case be invested with power in the nature of *cy pres*, it should be regarded as a natural incident to the equity jurisdiction and in the multiplicity of charitable institutions organized for the general benefit and betterment of the people, it is indispensable that the doctrine should be accorded a more cordial reception in our scheme of jurisprudence. There is a constant tendency to adopt the principle in many of our courts. Massachusetts stands fully committed to the rule²⁸⁰ and it has obtained considerable indulgence in the Supreme Court of the United States.²⁸¹ Rhode Island has always recognized it as a salutary doctrine.²⁸² Kentucky is committed to the rule,²⁸³ and other States are gradually appreciating the beneficence and policy of the principle involved.²⁸⁴ The courts will not allow a valid trust to fail for the want of a trustee. Why allow it to fail for the want of a beneficiary? The trustee, if the one designated by the testator is incapable of acting, is designated by the court, and it requires no violence to logical deduction to

²⁷⁸ 2 Pom. Eq. Jur. 595.

²⁷⁹ Stratton v. Physio-Medical Institute, 148 Mass. 505.

²⁸⁰ Jackson v. Phillips, 14 Allen (Mass.), 539.

²⁸¹ Russell v. Allen, 107 U. S. 163.

²⁸² Pell v. Mercer, 14 R. I. 412.

²⁸³ Halden v. Chorn, 8 B. Mon. (Ky.) 70.

²⁸⁴ Estate of Hinckley, 58 Cal. 457; Heuser v. Harris, 42 Ill. 425; Academy v. Clemmens, 50 Mo. 167; Erskine v. Whitehead, 84 Ind. 357; Hasketh v. Murphey, 36 N. J. Eq. 304.

claim that a beneficiary, if the one selected be incapable of receiving the intended bounty, should be designated by the court. It is quite time that this entire question was summoned to a new audit and a more sensible rule adopted to the end that charity, so highly favored by the law, may receive more substantial recognition.

§ 223. The doctrine of spendthrift trusts considered.

a. *When trust funds are beyond the reach of creditors.* A party having the absolute right of disposition, may create a trust in favor of another, and in the instrument creating the same he may incorporate a recital to the effect that the income arising from the funds constituting the corpus of the trust shall not be alienated by the beneficiary or subjected to the demands of his creditors, although there is no cesser or limitation of the estate in such an event.²⁸⁵ This decision rendered by the Supreme Judicial Court of Massachusetts in 1882, after an elaborate re-argument of the principles involved, merely adopted a rule already enunciated by the Supreme Court of the United States in the celebrated case of *Nichols v. Eaton*, 91 U. S. 716. It indicated a departure from the English rule which subjects trust funds to the payment of debts owing by the beneficiary notwithstanding an express provision in the instrument creating the trust to the contrary,²⁸⁶ and both cases have been the prolific source of discussion from jurists and text writers who regard the rule established as subversive of well settled principles of equity procedure. Mr. Wait, in his well known work on *Fraudulent Conveyances*, is particularly violent in his anathema of the principle contended for in the *Nichols* and *Adams* cases, and regards the attitude of the courts in this particular as palpably antagonistic to the just rights of the creditor class. Much of this opposition has been smelted down by repeated roasting until at the present day we hear little or nothing of it, professionally, except from the theory-mongers.

The reasoning of the Massachusetts court in the *Adams* case seems to me entirely logical and convincing. "The

²⁸⁵ *Broadway National Bank v. Ves.* 482; *Green v. Spicer*, 1 R. & Adams, 133 Mass. 170. M. 395; *Snowdon v. Dales*, 6 Sinn.

²⁸⁶ See *Brandon v. Robinson*, 18 524.

founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. We are not able to see that it would violate any principle of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. It is argued that the vesting a man with apparent wealth tends to mislead creditors, and induces them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of the estate especially in view of our registry system by which all matters relating to real property are spread upon the public records. Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him is a different question. The mental equipment that cannot assimilate the force of this reasoning should not vex itself with the intricacies of a legal controversy.²⁸⁷

The founder of a trust should be able to secure the beneficial effects of it to the object of his bounty by an express provision in the instrument creating it to the effect that the income arising from the trust fund shall not become chargeable with the debts of the beneficiary nor alienable by anticipation. It should be remembered in this connection that a "trust" is frequently created in favor of some beneficiary who has developed an utter incompetency to properly administer his own affairs. This incompetency may result from pre-natal deficiencies of intellect, or from acquired habits of dissipation and improvidence. The donor in such a case wishing to place the beneficiary beyond the possibility of becoming a public charge or to avoid the relapsing into a state of

²⁸⁷ See *White v. White*, 30 Vt. 113; *Contra Tillingham v. Bradford*, 5 R. I. 205; *Mebane v. Me-Shankland's Appeal*, 47 Pa. St. 131.

squalor and degradation, adopts this method of providing for his wants. The public at large are indirectly interested in seeing that such a provision is rigidly enforced in order to prevent the incompetency and improvidence of the beneficiary from resulting in a public burden. And for this reason the equity courts of this country repudiate the assertion of the English decisions which allow the beneficiary to mortgage or alien his expectant income. Courts that have sustained only tangential relations with the experiment of enforcing trusts with a view of permanent advantage to the beneficiary must have experienced the difficulty of enforcing the trust where the beneficiary was at liberty to alien or mortgage the income arising from it."²⁸⁸

²⁸⁸ White v. White, 30 Vt. 338; Arnwine v. Carroll, 4 Hal. Ch. 620; Brown v. Williamson, 36 Pa. St. 338; Rife v. Geyer, 59 Pa. St. 392; Nichols v. Eaton, 91 U. S. 716; and see Sparhawk v. Cloon, 125 Mass. 263; *Contra* Tillinghast v. Bradford, 5 R. I. 205; Smith v. Moore, 37 Ala. 327; Bramhall v. Ferris, 14 N. Y. 41; McIlvane v. Smith, 42 Mo. 45.

Note from Professor Walker.—The republican habits of our citizens being opposed to complicated family settlements, we have very few express trusts created by deed, though they occasionally occur. But trusts created by will are more frequent. The leading motive for creating a trust is to prevent property from being improvidently squandered. If a father wishes to provide with certainty for a child about to marry, and for the issue of such marriage, instead of conveying property to the child directly, he conveys it to trustees, with a declaration of his wishes; and thus, while he gives the annual income to the married couple, he secures the principal to

their children. In like manner, if a man wishes to guard with certainty against the prodigality of his heirs, he devises his property to trustees, with specific instructions; and thus limits the power of his heirs, as far as he considers expedient. (d) But a trust estate cannot be made incapable of alienation by the beneficiary, nor prevented from becoming liable for the payment of his debts. "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions or restrictions as to secure to it the inconsistent characteristics of right to enjoyment by the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." Swayne, J.,

b. *Partial review of the Pennsylvania cases.* It is well settled in Pennsylvania since *Barnett's App.*, 46 Pa. 392, although previous to that decision a contrary doctrine prevailed, that where an active trust is created to give effect to a well-defined and lawful purpose of a donor or devisor, with respect to the party to be benefited thereby, the trust will be sustained, whether the *cestui que trust* be *sui juris* or not. It is as well settled in Pennsylvania that it is a lawful purpose, upon the part of a father, to protect his bounty to a spendthrift son, both principal and interest, not only against his son's improvidence, but also against his creditors²⁸⁹ and in *Ashhurst's App.* 77 Pa. 464, it is said that a spendthrift trust may be created as well for a woman as for a man. But it has never been held by this court that a person *sui juris* could settle his entire estate upon himself free from liability for debts. Indeed, the very contrary has been ruled in *Mackason's App.*, 42 Pa. 330. In that case, the trustees were to hold the estate of the settlor free and clear of his debts; to pay the net income, without anticipation, during his life to himself, after his death to his appointee by will, and, in default of an appointment to his heirs, and it was held that property so settled was assets in the hands of the trustees for the payment of

in *Nichols v. Levy*, 5 Wall. 441. This is altered by statute in Tennessee. *Nichols v. Levy*, *supra*; *Turney v. Massingill*, 7 Lea (Va.), 353. In Pennsylvania, Massachusetts and Kentucky, where the doctrine of spendthrift trusts obtains, such a provision is allowed if the beneficiary is entirely excluded from control of the funds. *Broadway Bank v. Adams*, 33 Mass. 170; *Vaux v. Parke*, 7 W. & S. 19; *Pope v. Elliott*, 8 B. Monr. (Ky.) 56. In New York, the court will leave him a reasonable sum for support, and so in several States by statute. *Genet v. Beekman*, 45 Barb. (N. Y.) 382; *Campbell v. Foster*, 35 N. Y. 361; *Adams, Eq. *43*; *Perry on Trusts*, sect. 386. This doctrine is exam-

ined and all the cases given in *Gray on Restraints on Alienation*. The only exceptions to this rule are the separate use and pin-money trusts for married women. *Adams, Eq. *43*; *Perry on Trusts*, sect. 387.) These examples will serve for illustration; and a little reflection will convince any one of the very great utility of this description of estates. (Cited from *Walker's Am. Law*, p. 373.)

²⁸⁹ *Fisher v. Taylor*, 2 Rawle, 33; *Brown v. Williamson*, 36 Pa. 338; *Rife v. Geyer*, 59 Pa. 385; *Overman's App.* 88 Pa. 276; *Eberly's App.* 110 Pa. 95, 1 Cent. Rep. 97; *People's Sav. Bank v. Denig*, 131 Pa. 241.

debts, whether contracted prior or subsequent to the execution of the deed of trust; and that the devisees or appointees under the will of the settlor were postponed to his creditors. After stating the facts, this court in the opinion filed, says: "This statement brings us to the simple inquiry, Can the owner of property so dispose of it for his own use, benefit and support, as to put it beyond the reach of liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason therefor excepting to withdraw it from such liability, and thus retain the temporal ownership with its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property and repeal all our statutes and decisions against frauds."

Yet Chief Justice Agnew said in *Overman's Appeal*, 88 Pa. St. 276, 281: "It (a spendthrift trust) is exceptional in its very nature, because it contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. * * * A trust to pay income for life may last for the longest period of human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed of a former period, or that the non-payment of debts should be encouraged."²⁹⁰

In *Leavitt v. Beirne*, 21 Conn. 1, property was devised to a married woman, for the exclusive use of herself and her children, free from the debts and control of her husband; and to secure the same to their unimpaired enjoyment, he gave the property in trust, with full authority to apply the property as to the trustee should seem best for their exclusive benefit during her life; and on her death to divide the same among her children. It was held that the principal of

²⁹⁰ See Gray on Restraints on Alienation, § 234.

the trust fund was not liable for debts contracted by the wife. Waite, J. says: "A man may have a son so fallen into vicious habits as to be utterly unfit for the management of any property. A gift to him might be worse than useless. That son may have a wife and children whom he entirely neglects. The father (may) be both able and willing to make ample provision for them, and save them from being a public burden; but he can do nothing through the instrumentality of his son. But may he not, through the intervention of trustees, in whom he can confide, and place property in their hands for the benefit of his son and family, beyond his control?"

On the decisions sustaining the right of the donor to exclude by the terms of the trust the creditors of the beneficiary, the following may be noted as containing exhaustive examinations of the principle involved, and vigorous arguments in vindication of the right.²⁹¹ It was settled at a very early day in Pennsylvania that limitations of this character were valid,²⁹² and they have since been frequently upheld.²⁹³ So in Vermont,²⁹⁴ Maryland,²⁹⁵ Connecticut,²⁹⁶ and Virginia.²⁹⁷

c. *Attitude of the New York Court of Appeals.* The doctrine of the English courts is well settled on the point involved, and some courts of this country have followed it. But in *Nichols v. Eaton*, 91 U. S. 716; 23 L. ed. 254, the Supreme Court of the United States was not disposed to accept the doctrine in so far as it restricted the power of testamentary disposition so as to prevent the beneficiary from using and enjoying the benefits of the devise against the claims of creditors. In that case the bankruptcy of the devisee was by the will to terminate all his interest in the estate, and his creditors were denied the right to the estate or its profits after the act of bankruptcy. Where the debtor, who is the

²⁹¹ *Pope v. Elliott*, 8 B. Mon. 56; *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 113.

²⁹² *Fisher v. Taylor*, 2 Rawle (Pa.), 33.

²⁹³ *Ashhurst v. Given*, 5 Watts &

S. 323; *Holdship v. Patterson*, 7 Watts (Pa.), 547; *Brown v. Williamson*, 36 Pa. 338.

²⁹⁴ *White v. White*, 30 Vt. 338.

²⁹⁵ *Smith v. Towers*, 69 Md. 77.

²⁹⁶ *Leavitt v. Beirne*, 21 Conn. 1.

²⁹⁷ *Garland v. Garland*, 87 Va. 758, 13 L. R. A. 212.

beneficiary, has any substantial right in the property that a chancellor can enforce, then, so long as that right continues, his interest is liable for his debts, but no longer. The event happening upon which the interest passes to another the creditor is without remedy.

Nor are we without precedent establishing the doctrine that the event upon which the beneficiary may be divested of title may be the decision of a chancellor subjecting the interest or income to the payment of the debts of the *cestui que trust*.

In a New York case of some celebrity, one Joshua Ferris died in 1848, leaving this codicil to his will: "I hereby declare in making provision in my will that the income of one-third of my estate upon payment of debts and legacies should be paid to my son, Myron H. Ferris, it was my design to make provision for the support of himself and family which could not be taken from them by his creditors, and, for the purpose of making myself more plainly understood on this point and to carry out said design, it is my will that in case creditors' bill shall be filed or any proceedings instituted against my son Myron for the purpose of reaching the interest or income so provided for him, and diverting it from the object intended by me, and a decree of judgment obtained for that purpose, that then, from that period, the said interest or income shall cease; and I direct my executors from henceforth to expend the said interest or income for the support of the family of the said Myron H. Ferris, either by paying the same to his wife, or in any other practical way in their discretion." *Bramhall v. Ferris*, 14 N. Y. 41.

The controversy was in that case between the creditors of the son and the devisees over or the executors. The New York Court of Appeals was then presided over by Denio, as chief justice, with three associates, and the court held without dissent that the provision of the will that the interest of the devisee should cease on the recovery of a judgment by creditors, was valid.

Without regard to the view taken by the English courts on this question, some courts of the highest authority in this country maintain the opposite contention, holding that those considerations which apply to legal estates have no ap-

plication where property is transferred in trust, as in such instances the trustee takes the whole property, with the usual incidents of alienation, and in like manner the beneficiary takes the legal title to the income when it is paid over to him, and therefore the point about restraints upon alienation has no foundation either in law or in fact. This is the position taken by the Supreme Court of Massachusetts in a cause which was twice argued,²⁹⁸ and the trust in that case, held valid.

Similar adjudications have been made in Pennsylvania from an early period in its judicial history;²⁹⁹ and in other States.³⁰⁰ The two cases just cited are quite recent, the former having been decided in 1887, and the latter in 1891.

The Supreme Court of the United States in *Nichols v. Eaton*, 91 U. S. 716; 23 L. ed. 254, has affirmed the validity of such trusts, and also in a subsequent case.³⁰¹ The opposite view is taken in several States. In some States the validity of such trusts, *where the fund proceeds from the bounty of another*, is sanctioned by express statutes. This is true of New York, New Jersey, Illinois and Tennessee. Decisions in those States, therefore, are of no value in the discussion of the question where such statutory provisions are not involved.

d. *Views of Chief Justice Morton in Bank v. Adams.* The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in several states. The tendency has been in favor of such a power in the founder.³⁰²

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise

²⁹⁸ *Broadway Nat. Bank v. Adams*, 133 Mass. 170.

²⁹⁹ *Thackara v. Mintzer*, 100 Pa. 151, and cases cited.

³⁰⁰ *Vermont, Barnes v. Dow*, 4 New Eng. Rep. 717, 59 Vt. 530, and cases cited; *Maryland, Smith v. Towers*, 12 Cent. Rep. 872.

³⁰¹ *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264.

³⁰² *Braman v. Stiles*, 2 Pick. 460; *Perkins v. Hays*, 3 Gray (N. Y.), 405; *Russell v. Grinnell*, 105 Mass. 425; *Hall v. Williams*, 120 Mass. 344; *Sparhawk v. Cloon*, 125 Mass. 263.

absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted.³⁰³

Lord Coke gives as the reason of the rule that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and purity of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one under review, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principle nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts. As is stated in *Sparhawk v. Cloon*, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts.³⁰⁴

The English rule has been adopted in several of the courts of this country.³⁰⁵

³⁰³ Co. Lit. 223a; Blackstone Bank v. Davis, 21 Pick. 42.

³⁰⁴ Brandon v. Robinson, 18 Ves. 429; Green v. Spicer, 1 Russ. & Myl. 395; Rochford v. Hackman, 9 Hare, 475; Trappes v. Meredith, L. R. 9 Eq. 229; Snowden v. Dales,

6 Sim. 524; Rippon v. Norton, 2 Beav. 63.

³⁰⁵ Tillinghast v. Bradford, 5 R. I. 305; Heath v. Bishop, 4 Rich. Eq. 46; Dick v. Pitchford, 1 Dev. & Bat. Eq. 480; Mebane v. Mebane, 4 Ired. Eq. 131.

Other courts as we have seen have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts.³⁰⁶

A settlement in trust expressly providing that the income shall not be alienable by the *cestui que trust* by anticipation, and shall not be subject to his creditors, is valid, although there is no cesser or limitation over of the estate in the event of the *cestui que trust's* bankruptcy or insolvency. This is the rule in the Federal courts and in many of the States. The English doctrine, on the other hand, is to the effect that, where the income of a trust estate is given for life to a person other than a married woman, the equitable estate is alienable by, and liable in equity for, the debts of the *cestui que trust*,³⁰⁷ and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. Several of the States follow the English rule.³⁰⁸

This precise question arose for the first time in Massachusetts in the case just mentioned, and it was settled mainly upon the same grounds taken by Mr. Justice Miller in *Nichols v. Eaton*, *supra*. The gift by will was: "I give the sum of \$75,000 to my said executors * * * in trust to invest the same * * * and to pay the net income thereof semi-annually to my brother C. during his natural life, such payments to be made to him personally when convenient, otherwise upon his order or receipt in writing, in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment."

³⁰⁶ *Holdship v. Patterson*, 7 Watts, 547; *Shankland's Appeal*, 47 Penn. St. 113; *Rife v. Geyer*, 59 Penn. St. 393; *White v. White*, 30 Vt. 338; *Pope v. Elliott*, 8 B. Mon. 56; *Nichols v. Eaton*, 91 U. S. 716; *Hyde v. Woods*, 94 U. S. 523;

Broadway Bank v. Adams, 133 Mass. 170.

³⁰⁷ *Graves v. Dolphin*, 1 Sim. 66.

³⁰⁸ The cases are cited in *Broadway National Bank v. Adams*, 133 Mass. 170. See, also, *Easterly v. Keney*, 36 Conn. 18; *Mebane v. Mebane*, 4 Ired. Eq. (N. C.) 131.

The court say: "The rule of public policy which subjects a debtor's property to the payment of his debts does not subject the property of a donor to the debts of his beneficiary, and does not give a creditor the right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach." This case was approved in *Baker v. Brown*, 146 Mass. 369. The doctrine seems to me to be just.

The following cases approve the doctrine:³⁰⁹

It is important to distinguish these cases from the case of a voluntary settlement by the owner of property *in his own behalf*. A person cannot settle his own property in trust and pay the income to himself for life, with a provision that it shall not be alienable by him or subject to his debts. Such a provision is contrary to the policy of the law, and is void.³¹⁰

This rule applies to a married woman settling her private property, and also to a woman settling her property in anticipation of marriage.

e. Of Chief Justice Agnew in Overman's Appeal. That a trust for a spendthrift, as it is termed, will be upheld in equity, is a settled doctrine of Pennsylvania, and rests on the donor's right of dominion over his own property for a reasonable time. But it is exceptionable in its very nature, because it contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. In order to support it, resort is had to a trust, which equity will enforce, and equity necessarily regards its reasonableness and the clearly defined intent of the donor. Without such a trust upheld in equity, title in the devisee or legatee claims to itself control and liability to creditors. As this is a trust resting in equity, it is clear that equity will support it only as long as it rests on the well-defined intention of the donor. When that is gone, the trust falls with the loss of

³⁰⁹ *Spindle v. Shreve*, 4 Fed. Rep. 136; *Lampert v. Haydel*, 20 Me. Ap. 616; *Thackara v. Mintzer*, 100 Pa. St. 151; *Steib v. Whitehead*, 111 Ill. 247; *White v. White*, 30 Vt. 338; *Smith v. Towers*, 69 Md. 77.

³¹⁰ *Pacific National Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342; *McIlvaine v. Smith*, 42 Me. 45.

this, the only true basis. A trust to pay income for life may last for the longest period of human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed of a former period, or that the non-payment of debts should be encouraged.³¹¹

f. *Of Mr. Perry and his work on Trusts.* *Nichols v. Eaton*, 91 U. S. 716, cited and approved in *Hyde v. Woods*, 94 U. S. 523; *Ashurst v. Given*, 5 Watts & S. 323; *Holdship v. Patterson*, 7 Watts, 547; *Brown v. Williamson*, 36 Pa. St. 338; *Still v. Spear*, 45 Pa. St. 168; *Shankland's App.* 47 Pa. St. 113; *Pope v. Elliott*, 8 B. Mon. 56; *White v. White*, 30 Vt. 338; *Campbell v. Foster*, 35 N. Y. 361. The argument in these cases proceeds upon the ground that the doctrine of the English case must rest upon the rights of creditors; and it is claimed that the policy of the States of this Union has not been carried so far in furtherance of creditor's rights, that creditors can have no claim upon property which belonged to the founder of the trust, and of which he had the full and entire right of disposing as he chose, for the benefit of the *cestui que trust*, who parts with nothing in return, and that the intent of the donor, clearly expressed in disposing of his property for a lawful purpose, must be carried out; and the laws enacted in nearly or quite every State, exempting property of greater or less amounts in value from liability for the payment of debts, are relied on as showing the policy of these States. It is conceded that there are, however, limitations which public policy or general statutes imposes upon dispositions of property, such as those designed to prevent perpetuities and accumulations in corporations, etc. But the owner of property is governed by the rules of law, both in the use and enjoyment and in disposing of his property; and the doctrine in question seems

³¹¹ Overman's Appeal, Penn. 1879. (Reported 88 Pa. 276.)

to be founded upon the rule that title to property includes the right of alienation and liability for debts, and it seems impossible that there can be any reason in public policy, under a free government, having for its object the growth and development of a commercial people, for such a limitation of the incidents of title to property, and the argument from the exemption laws would seem to be well answered by the maxim, *expressio unius est exclusio alterius*.

Many of the American cases, where the English doctrine has been doubted or denied, seem to have been cases of trust for the support and maintenance of the *cestui que trust*; and a clearly manifested intention on the part of the donor that the income of the fund shall be devoted to that purpose may impose a duty and give a consequent power in the trustee, either in his discretion or under the direction of the court, to pay over the income only in such manner as shall insure its application in accordance with the intent of the donor and protect it from the claims of creditors and the improvidence of the beneficiary, with substantially the same result upon the absolute character of the estate of the *cestui que trust* as if the instrument declaring the trust had expressly provided that the payments should be made at the discretion of the trustee — a result more in accordance with the rules of interpretation than a strict adherence to a definition to the extent of defeating the accomplishment of the benefit intended by the donor.³¹²

g. *Of Mr. Justice Miller in the great case of Nichols v. Eaton.* It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called

³¹² Perry on Trusts, p. 495, vol. 1, note.

a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for

self protection,¹ should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of *Fisher v. Taylor*, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, and take the title in their name in trust for his son, who was to have the rents, issues and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses and defining the powers of the trustees. * * * Nor is such a provision contrary to the policy of the law or to any Act of Assembly. Creditors cannot complain, because they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship v. Patterson*, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the installments which they had promised to pay could not be diverted from his creditors to the payment of his debts, and Gibson, C. J., remarks that "the fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable by the terms of the trust to his personal maintenance; for a benefactor may certainly provide for the maintenance of a friend, without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust; and, the estate being vested in trustees, the son could not alienate.³¹³

The same proposition is either expressly or impliedly

³¹³ Shanklord's Appeal, 47 Pa. St. 113.

asserted by that court in the cases of *Ashurst v. Given*, 5 W. & S. 323; *Brown v. Williamson*, 36 Pa. St. 338; *Still v. Spear*, 45 Id. 168.

In the case of *Lenvitt v. Bierne*, 21 Conn., Waite, J., in delivering the opinion of the court says: "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management, or in the disposition of it until it has actually been paid over to him by the trustees;" and he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell et al. v. Hanqy et al.*, 10 Gratt. 336, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope's Executors v. Elliott & Co.*, 8 Ben. Monr. 56, the testator had directed his executors to pay for the support of Robert Pope the sum of \$25 per month. Robert Pope having been in the Rocky Mountains until the sum of \$225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of \$25 per month, or \$300 per year; and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary

to law or public policy. After an examination of the statutes of Kentucky and the general principle of equity jurisprudence on this subject, they hold that neither of these are invaded by the provisions of the will.

The last case we shall refer to specially is that of *Campbell v. Foster*, 35 N. Y. Ct. of App. 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and, while the argument is largely based upon the special provision of the statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

That being so, it follows, that the interest of the *cestui que trust*, whatever it may be, is liable in a court of equity for his debts. For it would be a shame upon any system of law, if, through the medium of a trust of any kind of contrivance, property, from which a person is absolutely entitled to a comfortable, perhaps an affluent support, and over which he can exercise the highest right of property, namely, alienation, and which, upon his death, would undoubtedly be assets, should be shielded from the creditors of that person during his life. There is no such reproach upon nor absurdity in our law; for we hold, that whatever interest a debtor has in property of any sort may be reached by his creditors, either at law or in equity, according to the nature of the property. Terms of exclusion of the donee's creditors, not amounting to a limitation of the estate, can no more repel the creditors, than a restraint upon alienation can tie the hands of the donee himself. Liability for debts ought to be, and is, just as much an incident of property, as the *jus disponendi* is; for, indeed, it is one mode of exercising the power of disposition.

In *Hyde v. Woods*, 94 U. S. 526, Mr. Justice Miller takes occasion to observe that his own opinion in *Nichols v. Eaton*, 91 U. S. 716, "was well considered," and says: "In that case, the mother of the bankrupt Eaton, had bequeathed to

him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy. But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken, that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

h. *Comments.* Although they stand for much that is yet in dispute, these twin cases of *Nichols v. Eaton* and *Broadway Bank v. Adams*, will ever offer an insuperable bar to the prosperous survival of what is left of the opposite doctrine. Both cases were submitted to the utmost rigor of critical procedure; both were decided by tribunals of exceptional ability, and both were illuminated by the scholarly research of eminent practitioners who focused upon the contention every available argument known to either law or equity. These decisions have been assailed by much turgid rhetoric, and have been stigmatized as "unfortunate" and "misleading" by a class of critics, who are much better qualified to follow than to lead on any avenue of judicial exposition, which requires the least mental tuition. There is a growing conviction that the creditor class in this country have been pretty carefully provided for, and the danger that some of them will fail to "collect a bill" after all the facilities the law affords them, is rather remote and should not hinder the enunciation of a principle that is bottomed on a wise public policy. We have every day occurrences of the peculiar estate which is a recent creation among us known as "homestead exemption." To raise this peculiar right a man is at liberty to employ the funds accumulated by his own labor, and on signing the necessary documents, he places the aggregation of that fund beyond the reach of creditors, although it represents something upon which to a certain extent those creditors had a right to rely for payment. All this elicits no particular

wail from the creditor classes or their self-constituted champions. How much more then is it permissible for a fund to be placed beyond their clutches by a grantor who owes them nothing, and from whom they have no right to expect indemnity. Declamatory assertion is not proof, and we are wholly unable to perceive the least menace to our inalienable rights in a testamentary provision that secures to a man and his family the means of subsistence, even in luxury, if you will — when the terms upon which he received this benefit are spread upon the public records and open to the inspection of all. The fact is, that the creditor is in a feverish anxiety to increase his sale, and is entirely willing to take chances. If he is doing business on the credit system at this late day, the law should not supplement his folly by struggling to protect him in such a quixotic undertaking.

Both cases have been singularly unfortunate in failing to meet with the approval of eminent professors in the law who are constantly asserting their claims for recognition. They place great stress upon a principle of law that subjects a man's property to the payment of his debts, and this unquestioned postulate is paraded with as much pride as if it were new, and with as much zeal as if it were important to the discussion. They wholly evade or ignore the pitiless logic which asserts that while a rule of public policy subjects a doctor's property to the payment of his debts, *it does not subject the property of the donor to the debts of his beneficiaries*, and the debtor has no ground of complaint if, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

The critics of *Nichols v. Eaton*, were too apt to rely upon dogmatic assertion — which is not proof — upon passionate entreaty — which cannot affect a pillared law — and upon furious invective that never should sway an impartial judge for the overthrow of a decision that appealed to every just sentiment that can arise in favor of the meritorious litigant.

Rants worthy only of a college declamation came from all radii which as exuberant exhibits of mental sterility and penury of thinking have been unsurpassed, but which have been as yet ineffectual in disturbing or in subverting the great

principle which underlies the decision of that case. In law we aspire to know the reason, in other sciences we simply aspire to doubt; in lectures on fine distinctions in philosophy, or the abstractions of metaphysics we can tolerate a "theory" but with a legal proposition we demand the rigid analysis of facts and the equally rigid application of principles. The diatribes against the decision start out with a great display of *a priori* reasoning but generally end in a dismal failure to convince any one of the error in the ruling of the court. Like the Code reform it has had to contend with a dead weight of passion, prejudice and bigotry — impervious to argument, immovable by discussion — uninfluenced by progress, and assertive of its fore-ordained right to obstruct the wheels of justice at every turn.

Its detractors have been outvoted but by no means silenced. I leave them in undisturbed possession of whatever advantage there may be in the "last word."

§ 224. Parol evidence to establish a resulting trust. All the facts tending to sustain a resulting trust may be shown by parol evidence.³¹⁴ A leading case is that of *Boyd v. McLean*, 1 Johns. Ch. 582. A more recent case is that of *Foot v. Bryant*, 47 N. Y. 544, in which Chief Justice Church employs the following language: "The general principles of equity and good conscience, applied to certain situations and acts of the parties, are used to raise presumptions of intentions, and to impress property with trusts, and to clothe one party with the character and obligations of a trustee and another with the rights and privileges of a *cestui que trust* for the purpose of securing honesty and fair dealing among mankind, and to prevent fraud and injustice. The statute referred to (of Frauds), was never intended to interfere with the application of these equitable and benign principles; but it was designed to prevent fraud and perjuries by prohibiting the creation of trusts relating to real estate dependent solely upon mere verbal or parol conversations or agreements.

The correct view seems to be this: Equity will at all times lend its aid to defeat a fraud, notwithstanding the Statute of

³¹⁴ 1 Rice, Ev. 284.

Frauds. Any unconscionable act by which it is sought to defraud a party calls for the protection of the court, and parol evidence is always admissible to show the fraud.³¹⁵

In the case of *Ringo v. Richardson*, 53 Mo. 385, this court, speaking through Sherwood, J., announced the doctrine that "testimony as to verbal admissions of persons since dead is to be received with great allowance, and whenever it is attempted to prove resulting trusts by virtue of such admissions, the testimony must be clear, strong and unequivocal, and leave no room for doubt in the mind of the chancellor as to the existence of such a trust. And the admissions should be supported by other circumstances, also going to show the existence of the trust. In the case at bar there are no such supporting circumstances going, also, to show the existence of the alleged trust."

In the case of *Johnson v. Quarries*, 46 Mo. 423, Bliss, J., delivering the opinion, a similar doctrine is announced; and, proceeding further, it is, in effect, held that "evidence of declaration in the nature of admissions by a deceased person, although competent, never amounts to direct proof of the facts claimed to have been admitted by those declarations, and it has sometimes been doubted whether they ought to be received at all, when introduced for the purpose of divesting a title created by a deed. However, if properly sustained by other circumstances, such declarations would warrant courts in sustaining the claim."

Authorities collected. If a trust is declared in writing, parol evidence is inadmissible to contradict the expressed intentions of the instrument,³¹⁶ but if the instrument is vague and ambiguous, parol evidence may be introduced to assist in its interpretation.³¹⁷ An absolute conveyance of land cannot be shown

³¹⁵ *Ryan v. Dox*, 34 N. Y. 307; 1 Rice, Ev. 285.

³¹⁶ *Lewis v. Lewis*, 2 Rep. in Ch. 77; *Finch's Case*, 4 Inst. 86; *Steere v. Steere*, 5 Johns. Ch. 1 (1 L. ed.), 987, 9 Am. Dec. 256; *Simms v. Smith*, 11 Ga. 198; *Dickenson v. Dickenson*, 2 Murph. 279; *Lloyd v. Inglis*, 1 Desaus. Eq. 333; *Harris v. Barnett*, 3 Gratt. 339; *Mann v.*

Mann, 1 Johns. Ch. 234, 1 L. ed. 124; *Ashley v. Robinson*, 29 Ala. 112, 65 Am. Dec. 387; *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *Lake v. Freer*, 11 Ill. App. 576.

³¹⁷ *Steere v. Steere*, *supra*; *Forster v. Hale*, 3 Ves. Jr. 696; *Taylor v. Taylor*, 1 Atk. 386.

by the grantor to be a grant in trust for himself, no fraud or mistake being alleged,³¹⁸ and evidence tending to show that a deed absolute on its face is a mortgage or a conveyance in trust, should be clear and received with great caution.³¹⁹ Want of consideration for a deed, possession of land by the grantor after conveyance, and the non-payment of the purchase money, may be put in evidence to show a trust relation.³²⁰

If the instrument in any way indicates an intention of making a person the holder of both the legal and beneficial estate, a trust cannot be created by parol.³²¹ Neither can there be a trust by parol where a valuable consideration is paid,³²² unless it can be proved by a person not privy to a deed.³²³ Where property was conveyed for the benefit of a child, though no declaration of trust appeared in the deed, evidence was admitted to prove it.³²⁴ Whenever parol evidence is admitted to prove a trust or establish a trust it must be very clear and satisfactory.³²⁵

§ 225. Trusts for married women. A vast mass of learning has been swept away by the various statutory enactments which followed the New York legislation of 1848 regarding the separate estates of married women. Under the former law, both in England and in this country, a large proportion of trust estates were designed and administered for the benefit of married women, and there is a corresponding proportion of law reports devoted to this subject. In all of the

³¹⁸ *Sturtevant v. Sturtevant*, *supra*.

³¹⁹ *Corbit v. Smith*, 7 Ia. 60, 71 Am. Dec. 431; *Hurst v. Harper*, 14 Hun (N. Y.), 283; *Horn v. Keteltas*, 42 How. Pr. (N. Y.) 152; *McMahon v. Macy*, 51 N. Y. 161.

³²⁰ *Vandever v. Freeman*, 20 Tex. 33, 70 Am. Dec. 391, 1 Rice, Ev. 291.

³²¹ *Lewin, Trusts*, 51; *Dean v. Dean*, 6 Conn. 285; *Philbrook v. Delano*, 29 Me. 410; *Starr v. Starr*, 1 Ohio, 321; *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

³²² *Id.*; *Gilbert, Uses and Trusts*,

56, 57; *Pilkington v. Bayley*, 7 Bro. P. C. 383.

³²³ *Squire's App.* 70 Pa. 266; *Strong v. Glasgow*, 2 Murph. 289.

³²⁴ *Gay v. Hunt*, 1 Murph. 141; *Ross v. Norvell*, 1 Wash. 14, 1 Am. Dec. 422.

³²⁵ *Snelling v. Utterback*, 1 Bibb. 609, 4 Am. Dec. 661; *Hunter v. Bilyeu*, 30 Ill. 246; *Harrison v. Howard*, 1 Ired. Eq. 407; *Brady v. Park*, 4 Id. 430; *Lyman v. United Ins. Co.* 2 Johns. Ch. (N. Y.) 630, 1 L. ed. 519; *Philpott v. Elliott*, 4 Md. Ch. 273; 1 Rice on Evidence, 291.

States there are at the present time no specific rules peculiarly applicable to trusts for married women. Such trusts, wherever they do exist, repose substantially upon the same principles that underlie trust creation in other cases. It is no longer necessary to vest the separate provision for the wife in the hands of trustees. Modern law graciously condescends to regard her as capable of taking and holding real property as well after marriage as before it. So that much of the learning has become oblivionized, and the doctrine of trusts considerably simplified.

§ 226. Termination of the trust. A trust is extinguished by the entire fulfilment of its object, or by such object becoming impossible or unlawful.

A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustees and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.³²⁶ In some cases the instrument itself which creates the trust estate provides for the sale of the *corpus* of the trust on the lapse of certain time. In such case the trust is terminated when the sale takes place.³²⁷ Another cause of termination as above outlined is where the trust is impossible to be performed, where it becomes barren, dry, and naked. In such instances it is said a court of equity, if applied to, will compel a reconveyance either to the trustor or his legal heir. It certainly will not allow a vast estate to repose idly in the hands of the trustees, after the trust has become impossible of performance. In *Lade v. Holford*, Bull. N. P., 110, Lord Mansfield said that when trustees ought to convey to the beneficial owner he would leave it to the jury to presume, where such presumption might reasonably be made, that they had conveyed accordingly "In order to prevent a just title from being defeated by a matter of form." This case was approved and the doctrine applied by Lord Kenyon in

³²⁶ Cal. Civil Code, secs. 2279-2280. See *Shepard v. McEvers*, 4 Johns. Ch. (N. Y.) 136; *French v.*

Edwards, 88 U. S. 147; *Guphill v. Isbell*, 1 Bailey, 230.

³²⁷ *Kendall v. Gleason*, 152 Mass. 467.

England v. Slade, 4 T. R. 682. Three things must concur to warrant the presumption: 1, It must have been the duty of the trustee to convey; 2, There must be sufficient reason for the presumption; 3, The object of the presumption must be the support of a just title.³²⁸ The case must be clearly such that a court of equity, if called upon, would decree a reconveyance. Properly guarded in its application, the principle is a salutary one. It prevents circuity of action with its delays and expense, quiets possession, and gives repose and security to titles. The rule has been firmly established in England, and was well settled in this country at an early day.³²⁹ The rule stated by Lord Mansfield is only an amplification of the maxim "that which ought to have been done is to be regarded as done in favor of him to whom, and against him from whom performance is due."

³²⁸ *Hill, Tr., Bisph.* 394.

Y.) 62; *Doe v. Campbell*, 10 *Johns.*

³²⁹ *Moore v. Jackson*, 4 *Wend.* (N. Y.) 475.

CHAPTER XIV.

REMAINDERS.

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§ 227. **Preliminary.** No topic in the entire law of realty is more abstruse and intricate than that relating to estates in expectancy. The elaborate contrivances of the English law of entailments, and the deep rooted tendency in the mother country to preserve landed property within the confines of

a particular family are largely responsible for the perplexities and uncertainties that infest this topic. Under the English system it is not at all unusual to find half a dozen remainders limited one after another in order to preclude the possibility of the estate passing into the hands of strangers. In this country the subject is bereft of much of its importance owing to the prevailing tendency to leave property unfettered, and to divide it equally among the heirs, and, as a consequence, our reports are singularly deficient in exhibiting the traces of such estates. While they have a well recognized status in our law of real property, the entire absence of the law of *primogeniture*—the principles of free alienation, and the disposition to equalize the distribution of estates, has had a very discouraging effect upon this species of land tenures on this side of the Atlantic.

As regards the commencement of estates the law regards them as being either in possession—as estates in fee, for life, or for years, or in reversion, or remainder—in other words, expectant. Estates in possession have received due treatment in the foregoing chapter. But such estates, while in the occupation and possession of some particular person, may belong in expectancy to somebody else. And this expectancy is the word that gives the title to the present chapter. Estates in expectancy then naturally bisect into reversions and remainders. The first is always created by operation of law, and may be in fee, for life, or for years. The incident of rent may or may not attach according to circumstances, and it is regarded as a present interest in land although it may not commence, or rather does not take effect, until some time in the future. The distinction between a reversion and a remainder is chiefly this—the latter are always created by act of the parties, and are never limited to the grantor, although in the loose and unconventional language of every-day life they are sometimes spoken of as if so limited. To give certitude to this proposition I will illustrate. Suppose a person seized in fee of certain lands grants them to A. for twenty years, and after the expiration of that term to B. and his heirs forever. Now, in this case B. has an estate in expectancy called a remainder. During the twenty years that A. is in occupation and possession, this

estate in expectancy continues in B. And by efflux of time it is annihilated, and B. takes a fee. The entire appositeness of the New York statutory definition is, therefore, clearly apparent. "A remainder is an estate limited to commence in possession at a future day, on the determination by lapse of time or otherwise of a precedent estate created at the same time."¹ As previously intimated the theory of our law may admit of several remainders over, one immediately following the other. As a grant to A. for five years, remainder to B. for life, remainder to C. in tail, and remainder to D. in fee.² What is to interfere with our regarding a remainder as any estate dependent on a precedent estate? It seems to me that after exhausting all the definitions this is about what it amounts to.

Hitherto we have considered estates solely with regard to their duration, or the quantity of interest which the owners have therein.¹ We are now to consider them in another view; with regard to the time of their enjoyment, when the actual permanency of the profits (that is the taking possession or receipt of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in possession, or in expectancy; and of expectancies there are two sorts; one created by the act of the parties, called a remainder; the other by act of law, and called a reversion.³

§ 228. Definition and nature. Estates in expectancy are such interests in real property as are to be enjoyed by the beneficiary at some time in the future usually on the termination of some precedent estate. They are characterized by the common law as reversions and remainders.⁴ It is an executory estate, as opposed to an estate in actual present possession, an estate executed. In New York it imports any present right or interest in real property which by possibility may vest in possession at a future day.⁵

¹ 1 R. S. 723, secs. 10-11; Sullivan v. Sullivan, 66 N. Y. 37; and see Sayward v. Sayward, 7 Me. 210.

² 4 Kent's Com. 198.

³ 2 Bl. Com. 163.

⁴ 2 Bl. Com. 163.

⁵ 7 Paige (N. Y.), 76; Story's Eq. Jur. sec. 334.

§ 229. **Classified as vested, contingent and cross.** A remainder is a remnant of an estate in lands or tenements, expectant on a particular estate created together with the same at one time.⁶ Thus, if A., a tenant in fee simple, grants lands to B. for life, and after B.'s decease to C. and his heirs, C.'s interest is termed a remainder in fee expectant on the decease of B.⁷ The term remainderman designates the party who is ultimately to receive an estate in remainder. Williams further states that the distinction between a remainder and a reversion is this — that between the particular tenant B. and the remainderman C. no tenure exists, from which it follows that no rent service can be incident to a remainder. They are usually designated as "vested," "contingent" and "cross," each having peculiar attributes. A remainder is "vested" when there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate. It is an estate grantable by any of the conveyances operating by force of the Statute of Uses. A remainder limited upon an estate tail is a vested remainder. In fact, a remainder is never held to be contingent if in harmony with the intention it can be regarded as vested.⁸

⁶ Co. Litt. 49a.

⁷ Williams on Real Property, 253.

⁸ Doe v. Consadine, 6 Wall. 474.

Bouvier says that a remainder is the remnant of an estate in lands or tenements expectant on a particular estate, created together with the same, at one time. (Co. Litt. 143a.)

Remainders are either vested or contingent. A vested remainder is one by which a present interest passes to the party, though to be enjoyed in future; and by which the estate is invariably fixed to remain to a determinate person, after the particular estate has been spent. (*Vide*, 2 Johns. (N. Y.) 288; 1 Yeates, R. 340.)

A contingent remainder is one

which is limited to take effect on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder never can take effect.

According to Mr. Fearne, contingent remainders may properly be distinguished into four sorts: 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself. 2. Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate. 3. Where the condition upon which the remainder is limited, is certain in

The essence of a remainder is that it is to arise immediately on the termination of the particular estate, by lapse of time, or other determinate event, and not by abridgment of it.⁹

One of the tests by which to distinguish between estates in remainder, and other contingent and conditional interests in real property is, that where the event, which gives birth to the ulterior limitation determines and breaks off the preceding estate, before its natural termination, or operates to abridge it, the limitation over does not create a remainder because it does not wait for the regular expiration of the preceding estate.¹⁰

Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate.¹¹ All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason, the rule of the common law was established, that a remainder could not be limited after a fee.¹²

event, but the determination of the particular estate may happen before it. 4. Where the person, to whom the remainder is limited, is not yet ascertained, or not yet in being. (Fearne, 5; 2 Bouvier's Law Dict. 441.)

⁹ Brattle Square Church Props. v. Grant, 3 Gray (Mass.), 141, 142.

¹⁰ 1 Jarm. on Wills, 780.

¹¹ 4 Kent's Com. 10, note; Martin v. Strachan, 5 T. R. 107, note; 1 Jarm. on Wills, 792.

¹² A remainder limited after a life estate to children or issue of either the life tenant or any other party, vests in the children or issue as rapidly as they come in being. Doe v.

At common law where the person was certain and the event uncertain, the remainder was descendible and passed to the heirs of the remainderman, but this was not so where the person was uncertain and the event certain.¹³

The distinction is well settled and universally recognized and seems to proceed upon this principle: That where the person is certain and the event only uncertain, though the remainder is contingent, yet the contingency cannot fall in without benefiting that particular person; hence, whatever this thing the remainderman has is, whether you call it a possibility or an interest, however little it may be worth, it is his and no one else's, and whatever an ancestor has in the nature of an interest in land, however small its value, passes by descent; while, on the other hand, it is inherent, in the very nature of descent, that there should be something in the ancestor, and if it is uncertain that the ancestor is to take even if the event happen, then there can be no such thing as a descent from him. And a contingent remainder, whether descendible or not, has never been called an interest in or right to the land.¹⁴

A contingent remainder is a mere right, and cannot be transferred before the contingency happens, otherwise than by way of estoppel. Any conveyance by matter of record or

Prigg, 8 Barn. & C. 231; Doe v. Provoost, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249; Ballard v. Ballard, 18 Pick. 41; Viner v. Francis, 2 Cox Ch. 190, and notes; 2 Bro. Ch. 658; Swinton v. Legare, 2 McCord, Ch. 440; Myers v. Myers, Id. 257; Jenkins v. Freyer, 4 Paige (N. Y.), 47; 3 L. ed. 336; 2 Jarm. Wills, 75; Dingley v. Dingley, 5 Mass. 535; Wight v. Shaw, 5 Cush. (Mass.) 56; Parker v. Converse, 5 Gray (Mass.), 338; Yeaton v. Roberts, *supra*; Carrol v. Hancock, 48 N. C. 471; Doe v. Considine, 73 U. S., 6 Wall. 475; 18 L. ed. 874; 2 Washb. Real Prop. 552, Coursey v. Davis, 46 Pa. 25. 84 Am. Dec. 519; Walker v. Johnston, 70 N. C. 576.

The power of appointment does not affect the vesting of the estate. Fearne, Contingent Remainders, 226; 2 Cruise, Dig. 146; 2 Washb. Real Prop. 542, 578; Bowen v. Chase, 94 U. S. 812, 24 L. ed. 184; Rogers v. Rogers, 11 R. I. 38; Railsback v. Lovejoy, 116 Ill. 442; 4 Kent's Com. 205; Breit v. Yeaton, 101 Ill. 242; Smith v. West, 103 Ill. 332; Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 56 Am. Rep. 776; McArthur v. Scott, 113 U. S. 340; 28 L. ed. 1015.

¹³ Fearne, Rem. 534-546; Lomax, Dig. 601; Watson v. Dodd, *supra*; 4 Kent's Com. 262.

¹⁴ Story, Eq. Jur. 1040; Fearne, Rem. 15-33.

by deed indented, of an executory or contingent interest will work an estoppel. Estoppels exist when no interest passes from the party.¹⁵

The principle of estoppel which is here invoked, is both sound and salutary, indeed there are but few applications of the doctrine in recent times that are not entirely justifiable upon every theory of equitable procedure. The old jaundiced view of estoppel was the product of a seriously distempered imagination, and reached the climax of mental obfuscation when it asserted that doctrine was an impediment to the development of truth.

§ 230. **Conditional limitations.** Douglass, in a note to 1 Doug. Rep. 755, thinks the distinction between a conditional limitation and a remainder, merely verbal; but Fearne¹⁶ vindicates the distinction, and relies on the authority of the case of *Cogan v. Cogan*, Cro. Eliz. 360. Conditional limitations which are contingent remainders, are limited to commence when the first estate is, by its original limitation, to determine; but conditional limitations, which are not remainders, are so limited as to be independent of the extent and measure given to the first estate, and are to take effect upon an event which may happen before the regular determination of the first estate, and so rescind it. This is Mr. Fearne's distinction; but he is not clear and fortunate when he comes to illustrate it by examples; and they appear to be quite refined, and essentially verbal.

§ 232. **Of vested remainders.** A remainder is said to be vested when a present interest passes to a party to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates; while a contingent remainder is one limited to take effect either in a dubious or uncertain person, or upon a dubious and uncertain event.¹⁷ This definition is very generally accepted. We have long and learned disquisitions which undertake to vindicate the entire accuracy of other definitions, and in all the severity of criticism Mr. Preston will impugn the accu-

¹⁵ 1 Lomax, Dig. 602; 4 Kent's Com. 260, 261.

¹⁶ Fearne on Remainders, 10-18.

¹⁷ 2 Bl. Com. 168.

racy of Coke.—Hargrave quarrels with both—Fearne indorses Hargrave; while the Lord Chancellor can scarcely restrain his contempt while he gasps an anathema of “no foundation in natural reason”—“raised and supported purely by the artifice of lawyers.” In all this the American student reposes upon the placid suggestion of Mr. Abbott that these wearisome details are of only limited interest in the United States. Resuming the discussion of Blackstone’s definition above quoted, it does not necessarily follow that every estate in remainder, which is subject to a contingency or a condition, is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder will not vest until that which is contingent has happened, and, therefore, become certain. If the latter, the estate vests immediately subject to be defeated by the happening of the condition.¹⁸ The case last cited is one of the most celebrated in the New York annals of testamentary law. And among its numerous incidents of value is an illustration drawn by Judge Rapallo as to what is a vested and contingent remainder. I quote: “A devise of lands to an infant when he shall become of age with remainder over if he dies under age creates a vested and not a contingent estate in the infant. It is defeasible by condition subsequent. His coming of age is not a condition precedent to the vesting of the estate. When nothing is interposed between the infant and his enjoyment of the possession of the estate except his own minority, he has a vested estate, subject to be defeated by the condition subsequent of his dying under age.”¹⁹ We have already had occasion to remark that a remainderman always takes by purchase, and never by descent.

In *Moore v. Lyons*, 25 Wend. 119, a devise to one for life, and from and after his death to three others or to the survivors or survivor of them, their or his heirs and assigns forever, was held, in the Court of Appeals, to give a vested interest to the remaindermen at the death of the testator, the words of survivorship being construed to refer to the death of the testator, and not to the death of the tenant for

¹⁸*Blanchard v. Blanchard*, 1 Allen (Mass.), 223; *Manice v. Manice*, 43 N. Y. 380.

¹⁹See, also, *Roper on Legacies*, 571; 2 *Redfield on Wills*, 592.

life. It has been conceded in the Supreme Court that, if the survivors at the death of the tenant for life had been intended, the remainder would have been contingent. Here, too, the survivorship directly qualified the gift, and it was not easy to regard it as a subsequent condition to an estate previously given. But Chancellor Walworth, in this case, was of opinion that the remainders would have been vested, even if the words of survivorship had been taken to refer to the death of the tenant for life; and states the rule to be, that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. Yet, if the estate is limited over to another in the event of the death of the first remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder."

The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.

It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.²⁰

Adverbs of time — as, where, thereafter, from, etc. — in a devise of a remainder, are construed to relate merely to the

²⁰ Johnson v. Valentine, 4 Sandf. (N. Y.) 43; Wrightson v. Macauley, 14 M. & W. 240; Chow's Appeal, 37 Pa. 28; Moore v. Lyons, 25 Wend. (N. Y.) 126; Phipps v. Williams, 5 Sim. 44; Gold v. Judson, 21 Conn. 622; Redfield, Wills, 379; Finlay v.

King, 3 Pet. 374; Asay v. Hoover, 5 Pa. 28; Carver v. Jackson, 4 Pet. 92; Purefoy v. Rogers, 2 Saund. 388; Doe v. Morgan 3 T. R. 765; Nightingale v. Burrell, 15 Pick. (Mass.) 110.

time of the enjoyment of the estate, and not the time of the vesting in interest.²¹

Where there is a devise to a class of persons to take effect in enjoyment at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterwards.²²

An estate once vested will not be divested unless the intent to divest clearly appears.²³

The law does not favor the abeyance of estates, and never allows it to arise by construction or implication.²⁴

"When a remainder is limited to a person *in esse* and ascertained, to take effect by express limitation, on the termination of the preceding particular estate, the remainder is unquestionably vested."²⁵

This rule is thus stated with more fullness by the Supreme Court of Massachusetts: "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman which was before either an executory devise

²¹ Johnson v. Valentine, 4 Sandf. (N. Y.) 43; Moore v. Lyons, 25 Wend. (N. Y.) 119; Boraston's case, 3 Coke, 120; Minnig v. Batdorff, 5 Pa. 506; Rives v. Frizzle, 8 Ired. Eq. 239.

²² Johnson v. Valentine, 4 Sandf. (N. Y.) 45; Doe v. Provost, 4 Johns. (N. Y.) 61; Chew's Appeal, 37 Pa. 28; Doe v. Ward, 9 Ad. & Ell. 582, 607; Hancock v. Hancock, 4 Dow, 203; Doe v. Nowell, 1 M. & S. 334; Bromfield v. Crowder, 1 B. & P. (N.

R.), 326; Phipps v. Ackers, 9 Cl. & F. 583; Doe v. Prigg, 8 Barn. & C. 235; Minnig v. Batdorff, 5 Pa. 505; Gold v. Judson, 21 Conn. 623.

²³ Chew's Appeal, 45 Pa. 232; Harrison v. Forman, 5 Ves. 208; Doe v. Perryn, 3 T. R. 493; Smither v. Willock, 9 Ves. 234.

²⁴ Com. Dig., Abeyance, A. E.; Catlin v. Jackson, 8 Johns. (N. Y.) 549; Ekins v. Dormer, 3 Atk. 534.

²⁵ Preston, Estates, 70.

or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder."²⁶

In 4th Kent's Commentaries, 282, it is said: "This has now become the settled technical construction of the language and the established English rule of construction."²⁷ It is added: "It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession — if the possession were to become vacant — distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues."²⁸

It is further said in the same volume, page 284: "A. devises to B. for life, remainder to his children, but if he dies without leaving children, remainder over, both the remainders are contingent; but if B. afterwards marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs."²⁹

The propositions stated are fully sustained by the authorities referred to. Other authorities, too numerous to be named, to the same effect, might be cited. We content ourselves with referring to *Horrison v. Foreman*, 5 Ves. 208; *Belk v. Slack*, 1 Keen, 238; *Bromfield v. Crowder*, 1 B. & P. (N. R.), 325; *Danforth v. Talbot*, 7 B. Mon. (Ky.) 624; *Goodtitle v. Whitby*, 1 Burr. 234; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Randoll v. Doe*, 5 Dow. 204; *Edwards v. Symons*, 6 Taunt. 214; *Phipps v. Ackers*, 9 Cl. & F. 583; *Stanley v. Stanley*, 16 Ves. 506; *Doe v. Nowell*, 1 M. & S. 334; *Boraston's Case*, 3 Coke, 52; *Doe v. Ewart*, 7 Ad. & El. 636, and *Minnig v. Botdorff*, 5 Pa. 503.

²⁶ *Blanchard v. Blanchard*, 1 Allen (Mass.), 227.

²⁷ *Doe v. Prigg*, 8 Barn. C. 231.

²⁸ *Williamson v. Field*, 2 Sandf. Ch. (N. Y.) 533.

²⁹ *Doe v. Perry*, Buller's op.;

Right v. Creber, 5 B. & C. 866; *Sisson v. Seabury*, Story, J. J., 1 Sumn. 243; *Hannan v. Osborn*, 4 Paige Ch. (N. Y.) 336; *Marsellis v. Thalhimer*, 2 Id. 35.

The doctrine received the sanction of the Supreme Court of Ohio in *Jefferies v. Lampson*, 10 O. St. 101, where it was adopted and applied. The same doctrine has been sanctioned by the U. S. Supreme Court.³⁰

§ 232. **Of contingent remainders.** Where a contingency is limited to depend upon an estate in freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only.³¹ It is the uncertainty of the right of enjoyment which renders a remainder contingent, not the uncertainty of the actual enjoyment.³²

³⁰ *Finlay v. King*, 3 Pet. 376; *Carver v. Jackson*, 4 Id. 1; *Williamson v. Berry*, 8 How. 495; *Croxall v. Sherrerd* (*ante*, 577); *Washb. Real Prop.* 229, 1 Greenl. Cruise, tit. Remainder; *Doe v. Considine*, 73 U. S. 458.

When a conveyance of the particular estate is made to support a remainder, the tenant for the particular estate takes it, and if the remainderman is in being he takes the fee. In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainderman on the delivery of the deed. The title thus vested becomes an estate of inheritance, and in case the remainderman dies before the particular estate is expended, the title passes to his heirs, unless the deed otherwise directs. (*Smith v. West*, 103 Ill. 332; *Moore v. Littel*, 41 N. Y. 75.) An estate is contingent when a right of enjoyment is to accrue on an event that is dubious or uncertain. But an estate is vested when there is an immediate fixed right of present or future enjoyment. In doubtful cases an interest shall, if it possibly

can, consistent with the rules of law, be construed to be vested in the first instance, rather than contingent, but if it cannot be construed as vested in the first instance, it shall be construed to become vested as early as possible. (*Fearne*, on Remainders, 73.)

³¹ *Fearne* on Remainders, 8, 10; *Butler's* notes, see *Poor v. Considine*, 73 U. S. 475.

³² *Lehndorf v. Cope*, 122 Ill. 307.

Note.—Chancellor Kent states the distinction in a manner that leaves nothing to be desired.

"A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate. (See *Hilliard v. Kearney*, 1 Busbee's Eq. (N. C.) 221, where the subject of the vesting of contingent interests is fully discussed; *Alexander v. Alexander*, 30 Eng. L. & Eq. 435; *Crofts v. Middleton*, 35 Id. 466; *Chamberlayne v. Chamberlayne*, 34 Id. 207.) It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment,

The test of a vested remainder is its present capacity to take effect in possession whenever the prior estate shall determine; that is, if the remainderman has the right in case of the sudden determination of the prior estate, immediately to go in and take possession, the remainder is vested.

In *Hawley v. James*, 5 Paige (N. Y.), 466, Chancellor Walworth says: "A remainder is vested in interest where the person is in being and ascertained who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates."

In *Moore v. Littel*, 41 N. Y. 72, it is said: "Decisions and text writers agree that by the common law a remainder is vested when there is a person in being who has a present capacity to take the estate in remainder, if the particular estate be then presently determined; otherwise the remainder is contingent."

In all these cases and in the text-books, it is always said that before the remainder is vested "the person must be ascertained" — "the person must be certain and determi-

which marks the difference between a vested and contingent interest. (c) Fearne on Rem. 3; Preston on Estates, vol. i. 71, 74. By the statute in 1844, of 7 and 8 Vict., ch. 76, for 'simplifying the assurance of property by deed,' contingent remainders are abolished, and every estate which would have taken effect as such, shall take effect, if in a will, as an executory devise; and if in a deed, as an executory limitation or estate of the same nature as an executory devise. Contingent remainders are by this statute abolished thereafter. Judge Williams, in his plain and familiar, but quite learned 'Principles of the Law of Real Property,' says that there is not an instance to be found of a valid contingent remainder, prior to the reign of Henry VI. The masterly treatise

of Mr. Fearne, and which is now in a great degree in the State of New York rendered useless by the late statutes, presented, as he observes, a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and simple principles. But the Act of 1845, ch. 106, repealed the Act of 7 and 8 Vict. c. 76, which abolished contingent remainders retrospectively, and allowed contingent interests to be disposed of by deed, but not to defeat or enlarge an estate tail. A bequest of a contingent interest without reference to the death of the legatees during the pendency of the contingency, vests such an interest as survives them on their dying before the determination of the contingent event. *Sanderlin v. Deford*, 2 Jones, Law (N. C.) 74.)" (4 Kent's Com. 241.)

nate;" and these expressions mean that the person must be one to whose competency to take no further or other condition attaches — one in respect to whom it is not necessary that an event shall occur, or condition be satisfied, save only that the precedent estate shall determine.

We shall adopt Blackstone's classification and definitions of "estates in remainder," both vested and contingent. They are approved by Kent, are more easily understood than those of other text writers, and better suited to the condition of real property in this country.

The uncertainty which makes a remainder contingent is uncertainty as to who will take at any given time if the precedent estate should then terminate. If there are persons in being who would be entitled to take if the precedent estate should presently determine, their interest is a vested future estate under the Revised Statutes, notwithstanding that it may be liable to be defeated, e. g., by the death of such a person before the precedent estate actually determines.³³

Under a deed of lands to A. for life, and after his death, then to his heirs and assigns forever, the children of A. during his life have a vested future estate in remainder, which is not contingent by the fact that it is liable to be defeated or modified by death of any of them, or the birth of other children during his life.³⁴

And this remainder is an estate of which the remainderman's wife is dowable.³⁵

"In determining whether a remainder is vested or contingent, it is to be considered that it was one of the objects of our Revised Statutes to introduce simplicity in these rules, and to favor the vesting of estates and the alienability thereof. And if there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested within the terms of the statute. It is not 'a person who now has a present fixed right of future possession or

³³ Ct. of Ap., 1868, *Sheridan v.*

House, 4 Abb. Ct. App. Dec. (N. Y.) 218; s. c. 4 Keyes, 569 (s. p. 4 Abb.

Ct. App. Dec. 98).

³⁴ *Id.*

³⁵ 1872, *House v. Jackson*, 50 N. Y. 161.

enjoyment,' but a person who would have an immediate right if the precedent estate were now to cease."³⁶

Contingent remainders designated also as "executory remainders." The presence of some element of uncertainty as to the ultimate vesting of an estate is what brands the interest as "contingent." It is where the intermediate estate may chance to determine and the remainder never take effect, that imparts the necessary conditional quality which goes to the making of a contingent estate. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a "vested" from a "contingent" remainder, and not the certainty that the possession will ever become vacant while the remainder continues.³⁷ Recurring to the illustration from Williams: If A. had limited the land after B.'s estate to the heir of C., a living person, the remainder would not be ready to come into possession at once, because, until C. dies there is no one to take the remainder; for *nemo est haeres viventis*," and during C.'s life there is no such person as his heir. So, if land is limited to B. for life, and after his death, if C. should then be living, to D., D.'s remainder is not vested, because its coming into possession depends not merely on the termination of B.'s estate, but on its determination during C.'s life; hence such a remainder is termed a contingent remainder, being a remainder limited so as to depend on an event or condition which may never happen, or be performed, or which may not happen or be performed till after the determination of the preceding estate.³⁸ When the uncertainty is removed, the remainder becomes vested. The possibility that a remainder may never come into possession at all, does not, of itself, make the remainder contingent. Thus, if land be granted to A. for life, remainder to B. for life, B.'s remainder is vested, although he may die before A. and consequently never come into possession.³⁹

³⁶ Moore v. Littel, 41 N. Y. 66.

³⁷ 2 Kent, 202.

³⁸ Fearn on Remainders, 1.

³⁹ Id. 216.

Contingent remainders may be defeated by destroying or deter-

mining the particular estate upon which they depend, before the contingency happens whereby they become vested. (1 Rep. 66, 135.)

Therefore, when there is tenant for life, with divers remainders in con-

§ 233. **Different kinds of contingent remainders.** Mr. Fearne, in his exhaustive treatise on contingent remainders, classifies them under four distinct heads, and accords to each an extended and critical analysis. Blackstone, on the contrary, regards them as falling under but two subdivisions, viz: 1, Such as take effect to an uncertain person, and, 2, such as take effect upon the happening of an uncertain event. There is much controversy over the respective merits of these two classifications.⁴⁰ Again I will endeavor to illustrate. Sup-

tingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate, before any of those remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son; for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders: in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. (See *post*. V.) This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey

Palmer, and other eminent counsel, who betook themselves to conveying during the time of the civil wars, in order thereby to secure in family settlements, a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life; and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention, within reasonable and proper bounds and introduced it into general use. (2 Comm. c. 11. See Moor. 486; 2 Roll. Abr. 797, pl. 12; 2 Sid. 159; 2 Chan. Rep. 170; 2 Jacob's Law Dict. tit. Remainders.)

⁴⁰ Mr. Challis reviews the controversy in these words: "It is conceived that, in this controversy, each side is partly in the right and partly in the wrong. The truth seems to be, that the definition of the first class of contingent remainders, as given by Fearne, is somewhat incomplete, and that, by reason of this incompleteness, it contains within its terms the estate of trustees to preserve contingent remainders; and that in this sense and to this extent, those who have contended that the estate in question is a contingent remainder, are right, but that the definition admits of being rectified so as to exclude

pose the remainder is limited to the first born son of B., who is childless at the time. Here you have a contingent remainder, for it is entirely uncertain that B. will ever have a son.

this estate, without at the same time excluding any other estate which it was designed to include, and that when examined by the proper tests for distinguishing vested estates in general from contingent estates in general, the estate of the trustee seems much more properly to come within the conception of a vested estate than of a contingent estate. This is equivalent to saying that the decision in *Dormer v. Parkhurst*, 3 Atk. 135, seems to be substantially right in principle.

"The estate of the trustees does seem to come within the words of Fearn's definition as stated in the text, if they are taken strictly. It is the fact that in this case 'the remainder depends entirely upon a contingent determination of the preceding estate itself;' and that while the precedent estate is capable of being determined in several ways, the estate of the trustees is so limited as to take effect only in case the determination shall take place in some of those ways. But the examples given by Fearn show his meaning. In those examples the contingent remainder is capable of being destroyed, if the precedent estate should determine in what may be called the wrong way; and this quality of contingent remainders supplied the principle motive which induced him to write his treatise. This distinguishing characteristic is not possessed by the estate of the trustees, because if the precedent estate should determine in the wrong way, that is,

by the death of the tenant for life, the estate of the trustee will not be destroyed, but will simultaneously determine by its own natural expiration. Nothing is more evident than that Fearn's treatise was not written to illustrate the nature of estates of this description; and if by inadvertence he has included any of them in his definition, the most reasonable course seems to be to amend the definition so as to exclude these extraneous specimens, and not to take advantage of the words of the definition in order to include within it something to which it was not meant to apply.

"The estate of the trustees is such that it either must actually take effect in possession or else must determine by natural expiration *eo instanti* with the determination of the precedent estate. But no words could be more appropriate to describe a vested estate. Every vested estate which is capable of a natural expiration, may, by possibility, fail to become an estate in possession, by reason of its determination during the continuance of, or *eo instanti* with the precedent estate. The peculiar feature of contingent remainders, and the only feature which makes it necessary to bestow upon them special consideration, is their liability to fail to become estates in possession by reason of something else than their own natural expiration.

"It accordingly seems to be expedient that the following proviso should be added to the definition above given of the first class of

And, as illustrative of the second class, suppose an estate is granted with a remainder to B. in fee, if B. should survive A. Here again, the remainder is contingent. But not because of any uncertainty in the person, as B. is a large and wholesome entity. But rather because there is uncertainty in the event for, obviously, B. may not survive A. Again, I cannot refrain from pointing out the simple precision of the New York revision which states the ultimate essence of all this learning in two brief lines. "Remainders are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain."⁴¹ And see the decision of the General Term of the Supreme Court in *Leslie v. Marshall*, 31 Barb. 564, opinion by Marvin, J. If it be within the power of language to make a more concise and accurate statement we are envious of that power. Glancing over the mighty elaborations of Mr. Fearne and Mr. Preston — recalling Mr. Cornish's labored view, where in seventy pages of fine type he seeks to show a defect in Coke's definition of "remainders," and the all but endless dissertations of dead and gone pundits, it is with a feeling of relief and gratification that we can reach at least this stage of the subject with something like a clear-headed notion of what contingent remainders are. He who wishes to experience a like sensation should devote his study to Fearne on Remainders, where the great art of simplifying a thing to a state of bewilderment has been most indubitably illustrated. It is generally referred to as a "treatise," it is more properly a nightmare. I have followed with waning hopes every intelligent attempt at its mastery, and hear that a group of advocates in London, having coherence enough to merit the name of a school, claim to understand it. I trust their claim is illusory — as in the light of personal experience it is permitted me to doubt that the human intellect can ever co-ordinate into any mutual relation of unity so much contradiction and absurdity. And yet this heterodite production imposed

contingent remainders. Provided, always, that the precedent estate is capable of determination in at least one way, which will neither vest the remainder nor cause it to

determine by its own natural expiration." (Challis, Real Prop. 116, 117.)

⁴¹ See sec. 234, *post*.

itself upon several generations of lawyers as a true triumph of genius! I have no wish to even minimize the services of this consecrated man, but regard it as a healthy manifestation of sanity and courage that Mr. Fearne is no longer read.

§ 234. **Modern legislation not favorable to contingent remainders.** The tendency of all modern legislation is against contingent remainders, and this, too, seems to be the drift of judicial construction. It is said, to have the fee in a state of abeyance, a condition that often occurs in contingent remainders, is always odious. This legislative and judicial current can be attributed to a variety of causes. One of the most influential reasons for the drift is inherent in the subject; for while a remainder, in its original simplicity, would appear to be easy and practical in its application and operation, yet the collateral refinements and complex questions that have grown out of it from time to time cause the inquiry to involve critical discussions upon the most abstruse, subtle and artificial distinctions in the law. To such an extent had this excessive refinement been carried, that Chancellor Kent said "that the English law of real property has, in the lapse of ages, become encumbered with much technical and abstruse refinement, which destroys its simplicity and good sense, and renders it almost impossible for ordinary minds to obtain the mastery of the science."⁴²

Lord Chancellor Cowper said "that it had no foundation in natural reason, but is raised and supported purely by the artificial reasoning of lawyers."⁴³

Let the modern lawyer undertake to read and comprehend the classification of contingent remainders in the treatise of Fearne, or Preston's observations on the rule in Shelley's case, until he becomes inextricably tangled in "wild involutions," and then the drift towards a less refined and a more easily comprehended law of real property will be appreciated. The reactionary feeling against the web of perplexing refinement arose in the place of its growth and development, and resulted in the Statute of 7 and 8 Vict. chap. 76, in 1844, "for simplifying the assurance of property

⁴² 4 Kent's Com. 212.

⁴³ Brown v. Barkham, Finch, Prec. in Ch. 462.

by deed." By this statute contingent remainders are abolished, and it is provided that every estate that would have taken effect as such shall take effect, if in a will, as an executory devise, and, if in a deed, as an executory estate or limitation of the same nature as an executory devise. By the Act of Parliament of 1845, chap. 106, so much of the Act of 7 and 8 Vict, chap. 76 as abolished contingent remainders retrospectively, was repealed, and this latter act allowed "contingent interests" to be disposed of by deed, but not to defeat or enlarge an estate; so that in all conveyances either by will or deed, made after the Statute of 7 and 8 Vict., contingent remainders were not created.

In this country the legislation has not been so radical, notwithstanding the existence of numerous and important reasons for it. The aversions of the law to the inheritance being in abeyance, the desire that the alienation of estates should be facilitated, the stability of the title, and the benefit of creditors are inducements, in addition to the complicated condition of the subject, to such legislative action as will render the construction of a will or conveyance easy of comprehension to the ordinary mind.

The statutes of New York define an "estate in remainder" as follows:

"Where a future estate is dependent on a precedent estate, it may be termed a 'remainder,' and may be created and transferred by that name."

These statutes also allow "a future estate which needs no particular estate to support it; and, where it is limited on a prior estate, it need not rest immediately upon the determination of the prior estate." Of course this legislation practically destroys "remainders," properly so called."

Under the statutes in various States, if the person who is to take the estate is ascertained, he has what is called a "vested interest in a contingent remainder," which may be alienated by deed. When the person is ascertained who is to take the remainder when it becomes vested, and he dies, it will pass to his heirs, or may be devised by him. It might always have been released by him to the reversioner.

⁴⁴ See *Hennessy v. Patterson*, 85 N. Y. 91.

In the case of *Putnam v. Story*, 132 Mass. 205, it is held that where there was a remainder to heirs, though contingent, it was assignable; it appearing that there were children living at the time. An attempted conveyance by deed will pass the estate by estoppel when it vests.⁴⁵

When, however, the contingency is not in reference to the person who is to take, but to the event upon which he is to take, the remainderman may grant his interest, and the grantee will take subject to the contingency.⁴⁶

In *Drake v. Brown*, 68 Pa. 223, Agnew, J., says: "It is immaterial whether his interest in the property was vested or contingent, it was liable for his debts."⁴⁷

It may pass to the assignee in insolvency.⁴⁸

Such a remainder descends.⁴⁹

In New York, Michigan, Minnesota and Wisconsin expectant estates are descendible, devisable, and alienable in the same manner as estates in possession. In the States of Massachusetts and Maine, when any contingent remainder is so limited to any person that in case of his death, the estate would descend to his heirs in fee simple, such person may, before the happening of the contingency, sell, assign or devise the premises subject to the contingency. Where lands are held by one person for life, and with a vested remainder in tail to another, the tenant and remainderman may together convey the same in fee simple. In Alabama no estate in lands can be created by way of a contingent remainder, but every estate created by will or deed, which might have taken effect as a contingent remainder or executory devise, has the same properties and effect as the latter estate.

The rule in the Shelley case, which was a part of the common law, has been repealed or altered by all the States, except in Maryland, Georgia, Texas, Indiana and Pennsylvania.

Judicial construction has been doing its work in this direction, but the line on which this warfare has been carried on

⁴⁵ *Robertson v. Wilson*, 38 N. H. 48.

⁴⁶ *Belcher v. Burnett*, 126 Mass. 230.

⁴⁷ *Kenyon v. See*, 94 N. Y. 563.

⁴⁸ *Chess' App.* 87 Pa. 362; *Buck*

⁴⁹ See, also, *White v. McPheeters*, 75 Mo. 286. *v. Lantz*, 49 Md. 439.

has been principally against contingent remainders, on the ground that they violate the rule against perpetuities, and that, like executory devises, they must be so limited as to take effect, if at all, within a life or lives in being and twenty-one years and a fraction after.

In Massachusetts the courts have applied the rule against perpetuities to contingent remainders, without question.⁵⁰

§ 235. Partiality of the courts for vested remainders. There are some rules for guiding the court in determining questions of this kind that have been so often declared in adjudicated cases, and so strongly emphasized by the text writers, and are so well settled as to become imperative in their operation and universal in their application. There is a prevalent disposition by all courts upon the grounds of general policy, to favor vested rather than contingent remainders, and consequently, where there arises from the terms of the conveyance a grave doubt as to whether the remainder vested at the death of the devisor, or should remain expectant and contingent until the happening of a future event, the doubt is always resolved in favor of a vested remainder.

Indeed, many well considered cases assert a still stronger rule in favor of vested remainders, by holding that all estates in remainder are to be treated as vested, except in a devise in which a condition precedent to the vesting is so clearly expressed that the court cannot treat it as vested, without doing so in plain contradiction of the language of the will. Another rule so often expressed that we find it everywhere in the books, but probably included in those already stated, is that no remainder will be construed to be contingent which may, consistently with the words used or the intention expressed, be deemed vested. Another goes to the extent that the intent to make a contingent remainder must be expressed in words so plain that there is no room for construction.⁵¹ These rules sufficiently indicate the leaning of the courts towards vested remainders.⁵²

⁵⁰ *Lovering v. Lovering*, 129 Mass. 97; *Hills v. Simonds*, 125 Mass. 536; *Otis v. McLellan*, 13 Allen (Mass.), 339.

⁵¹ *Straus v. Rost*, 67 Md. 465.

⁵² *Bunting v. Speaks*, 41 Kan. 424.

§ 236. **Is a freehold estate necessary to support a freehold contingent remainder?** In a qualified and restrictive way we must answer this question in the negative. Under the old common law regulations a freehold estate was necessary to support the remainder. But, as has been repeatedly indicated, we are rapidly receding from the tyranny of the common law and are rapidly developing a jurisprudence more in harmony with an advanced civilization, and the requirements of a commercial age. Statutory enactments are quite generally provided that a freehold is no longer necessary to support a remainder, and quite generally it is also saved from forfeiture or merger in the life estate. Provisions to this effect are not universal in this country, but will be found to obtain in several States, notably Alabama, Arkansas, California, Georgia, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Dakota, South Dakota, Texas, Vermont, Virginia, West Virginia, Washington and Wisconsin. Pennsylvania never tolerated the common law rule, and Louisiana is practically under the Napoleon code. Statutory regulations of this character cannot but have a salutary effect, and it is to be regretted that they are not of wider acceptance.

§ 237. **Conveyance of property in expectancy.** The sale of an heir's expectancy is not void in equity, but if unaccompanied by fraud and for a fair consideration, it will be upheld.⁵³ It follows from this postulate that a deed which purports to convey property which is in expectancy, or to be subsequently acquired, though inoperative as a grant, will be given effect as an executory agreement, and enforced according to its intent, if grounded on a valuable consideration, and free from any suggestion of fraud.⁵⁴ This view is repudiated in some jurisdictions as a fraud upon the ancestor productive of public mischief, and void at law and in equity.⁵⁵ Pomeroy says: "All conveyances and charges and contracts of sale of future and expectant interests during the life of the ancestor

⁵³ *Parsons v. Ely*, 45 Ill. 243.

⁵⁵ *Boynton v. Hubbard*, 7 Mass.

⁵⁴ *Bayler v. Com.*, 40 Pa. 37; 112.

Bailey v. Hoppin, 12 R. I. 568.

or life tenant upon an inadequate consideration (mark) will be relieved against in equity, and either wholly or partially set aside.⁶⁶ Such conveyances usually take the form of a *post obit* bond or contract, which is an agreement on the receipt of a sum of money by the obligor to pay a larger sum on the death of the person from whom he has some expectation of receiving an inheritance. Such contracts are not nullities and if the stipulated indemnity is a just consideration for the hazard it is enforceable. Such contracts are regarded with suspicion and will be rigidly scrutinized. *Hart v. Gregg*, 32 Ohio St. 502, is an illuminative case, holding that such a conveyance or contract does not operate to defeat the grantor's title afterward acquired by descent, except by way of legal or equitable estoppel and in the absence of covenants of warranty, he is not bound.

§ 238. **Cross-Remainders.** "Cross-remainders are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A., and of another lot to B., in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C. in fee, A. and B. have cross-remainders over by express terms; and on the failure of either, the other or his issue takes, and the remainder to C. is postponed; but if the devise had been to A. and B. of lots of each, and remainder over on the death of both of them, the cross-remainders to them would be implied. So, if different parcels of land are conveyed to different persons by deed, and by the limitation they are to have the parcel of each other when their respective interests shall determine, they take by cross-remainders; and this complex doctrine of cross-remainders, in the mode in which the parties become entitled, and in their proportions, though not in their interests, has a great analogy, as Mr. Preston observes, to the order of succession between co-partners. The courts lean in favor of cross-remainders, in order to effectuate the intention. It is a method to bring the estate together."⁶⁷

Cross-remainders will not be raised by implication in a will, unless the intention appears clearly that no person shall in-

⁶⁶ 2 Pom. Eq. Jur. 474.

⁶⁷ 4 Kent's Com. 235.

herit any part of the estate, or take it by way of remainder, as long as any of the devisees, or any of their issue to whom it is given, are alive."⁵⁸

Thus A. devised land to his four sons, B., C., D., and E., "and to their male heirs of their own bodies begotten, forever; and in case either of them should die before the age of twenty-one, his or their lands to be equally divided between their surviving brothers, or to their male heirs. B. died during infancy, before distribution of the lands, without issue, and C. and D. died successively afterwards, leaving male issue. Finally E. died, leaving issue female only. It was held, that this devise created no cross-remainders among the devisees, but that, upon the death of E. without issue male, the estate reverted to the heirs general of the devisor, except the share of B., which, on his death, went to the surviving brothers, and, on their deaths, to their respective heirs general."⁵⁹

It has been said that cross-remainders are accorded very scant respect, as between more than two they are never implied, but must arise from distinct recitals in the deed or will. Hence, a devise "to my four sons or the survivors of them, and their heirs and assigns, to be equally divided among them, when the youngest becomes of age," was held to vest a fee."⁶⁰

§ 239. Judicial Construction of remainders. The struggle with the courts has always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person — and any number of remainders for life to others in succession — and finally a remainder in fee simple or fee tail, each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession."⁶¹

⁵⁸ *Hungerford v. Anderson*, 4 Day (Conn.), 368.

⁵⁹ *Id.*

⁶⁰ *Lawrence v. McArter*, 10 Ohio, 37.

⁶¹ *Williams*, Real Prop. 208.

§ 240. Effect of power of sale annexed to a life estate. There is a slight misapprehension as to the effect of a power of sale when such power is supplemental or additional to a life estate. It has been gravely contended by lawyers of high repute that such a power practically and undisputably elevated the estate to the full dignity of a fee. This must be regarded as an erroneous view. Power to sell and convey the fee may at the same time limit a remainder after the termination of the life estate. If the power is so exercised as to dispose of the entire estate, of course the remainderman has nothing simply because there is nothing. But the remainder is not contingent because it is uncertain if the power will be so exercised.⁶⁷

§ 241. Remainders, how destroyed. If the particular estate is determined before the contingency happens on which the expectant estate depends, the remainder is annihilated, and the alteration in the particular estate which will destroy the remainder must concern its quantity, and not merely its quality.⁶⁸ The English cases say that a merger by the act of the parties of the particular estate is also equally effectual as a fine to destroy a contingent remainder. But on this doctrine of merger, the English law engrafts a multitude of perplexing subtleties, that are of no conceivable consequence in the American law. Chancellor Kent, when in one of his apologetic moods, could not restrain a rising emo-

⁶⁷ *Burleigh v. Clough*, 52 N. H. 267.

This case was decided in 1872, and the opinion was written by Mr. Justice Foster. Few, if any, of our State reports contain a more luminous exposition of a perplexing topic than will be found in this singularly exhaustive review. If Mr. Fearné could have emancipated himself from the trammels of an exceedingly voluble diction, he would not have made confusion worse confounded by spreading before the profession his alleged treatise. A distinguished member of

the New York Court of Appeals once characterized Fearné's treatise as "an evergreen tree of diabolical knowledge." But it is unquestionable that the very absurdities it emphasized originated the most salutary reforms. Judge Foster touches upon several of the protuberances in the law of remainders with extreme tact and rare comprehensiveness. And no student of our modern law of real property is justified in neglecting a careful review of this highly illustrative case.

⁶⁸ See Fearné on Remainders, 426.

tion of hostility to the senseless parade of trifling distinctions with which Fearné on Remainders is literally thatched, and in a mildly explosive way delivers himself as follows: "I allude to it merely as fresh proof of the everlasting uncertainty that perplexes this branch of legal science. This is one among the thousand samples of the refinements which have gradually accumulated, until they have, in a very considerable degree, overshadowed and obscured many parts of the English law of real property; and I am more and more impressed with a sense of the great utility of the provision rescuing contingent remainders, by legislative authority, from all perplexing dependence on the particular estate."

If the mild and philosophic chancellor could be goaded into splenetic observations over the general chaos of this theme, surely the poor drudge, who is floundering in an abyssmal welter of alleged *distinctions* that even Fearné's treatise fails to tabulate, may be excused for expressing his want of sympathy with the "symmetries of the common law."

It may be added that a person holding merely a trust cannot by any species of conveyance destroy a contingent remainder arising on the termination of the expectant estate. In such cases the legal estate is vested in the trustee, and such an investiture gives them a right of entry abundantly sufficient to support the remainder.⁶⁴

An estate in expectancy cannot, as a rule, be defeated by an act tortious or otherwise of the tenant of the precedent or particular estate. And a conveyance which would operate under the Statute of Uses, or a lease and release is competent to pass only such interest as the grantor himself lawfully possesses. In no case can he prejudice the rights of the remainderman.⁶⁵ And even in those few States where the freehold is said to be in abeyance, a remainder is practically indestructible.

Much learning has been displayed in the effort to inform us that under the common law, by entry for condition broken, or by disseizin of the particular tenant, or by feoffment, or merger, and descent cast, a contingent remainder might be

⁶⁴ 1 Greenl. Cruise, 717.

⁶⁵ Dennett v. Dennett, 43 N. H. 498.

defeated. All this learning is dust and rubbish in our modern law, but is valuable as casting a strong side light upon another of the wholesome features of the common law. That it was ever possible, in any land, to abolish such valuable rights as are frequently represented by remainders through the exercise of any mere whim of the occupant of the particular estate seems incredible, yet such was the ruling under the common law. To prevent this rank and glaring injustice a legal fiction was indulged by which a board of trustees was interposed between the particular estate and the expectant estate, and by this cumbersome device the latter estate retained its autonomy. But we are not called upon to pursue this subject further, as, in this country the expectancy is inviolable until the period of its natural limitation has been reached by the happening of the event upon which depended the enjoyment of the particular estate.

§ 242. **Rules as to remoteness.** Limitations will not take effect as contingent remainders where the contingency is *too remote*, and there has been a vast amount of refined theorizing in the application of this rule. For instance, double possibilities or a possibility on a possibility is without doubt obsolete as a rule of property. Williams says "that an estate cannot be given to an unborn person for life followed by any estate to any child of such unborn person."⁶⁶ Mr. Tiedeman says: "A remainder, therefore, may be made to depend upon any number of contingencies, provided the person who is to take is not the unborn child of an unborn person. This does not, of course, prevent the limitation of an estate tail to an unborn child. And when a testator attempts to give a life estate to an unborn person, with remainder in tail to his children, the courts, taking note of the general intent to create an estate tail, will construe the estate to the unborn person to be a fee tail, instead of declaring void the remainder in tail to his children. But if such a limitation appeared in a deed this construction could not be upheld, and the remainder would be declared void."⁶⁷ So, too, it is import-

⁶⁶ William's Real Prop. 274.

114; Jackson v. Brown, 13 Wend.

⁶⁷ Tied. Real Prop. sec. 417; citing *inter alia* Nourse v. Merriam, 8 Cush. (Mass.) 11; Allyn v. Mather, 9 Conn.

(N. Y.) 437; Daebler's App. 64 Pa. St. 15.

ant to remember that the event upon which a contingent remainder may depend is, in the language of Mr. Washburn, "that it must not be of such as to abridge the particular estate, for it is of the essence of a remainder that it should wait until the particular estate has had a natural determination, according to the terms of its limitation. The remainder must not, therefore, be in the nature of a condition at common law which may defeat the particular estate, for first, no one but the grantor in such a case could take advantage of it, and second, upon his doing so in the only way in which it can be done, namely, by the making of an entry, he would thereby regain his original seizin, and defeat the seizin as well as the freehold on which the remainder depended, wherefore no remainder could be limited upon a condition. If the particular estate be limited to two, with a remainder over upon the death of one of them to a stranger in fee, the remainder is void, because, as the survivor must have the estate for life, by reason of his having been a joint tenant with the deceased, the limitation over upon the death of one, can only take place by defeating the estate of the survivor. Had the limitation been to the survivor instead of a stranger, it would have been good."

It may be observed in this connection that an estate in expectancy can never be limited after an estate upon condition, and to take effect only upon the breach of the condition. Concisely this proposition may be stated thus: The particular estate cannot be defeated before its natural termination by the mere happening of some contingent event, which may abridge the estate. Again, let us resort to Mr. Washburn's very apt illustration. "The proposition that a remainder must not abridge the particular estate, may be illustrated by a limitation of an estate to a widow with an expectant estate depending upon it. Thus, supposing it were desired to limit an estate expectant upon her marrying again, it would not do to make an estate to her for life, remainder to A. B. in fee on condition she remains a widow, for if the heir were to enter upon her marrying again, and defeat the estate, he would also defeat the remainder. To accomplish the desired purpose, the limitation to the widow should be during her widowhood, with remainder over. The remainder upon her

marrying again will then take effect upon the natural determination of her estate. But it will be understood, that the propositions here sought to be illustrated, apply only to estates at common law; for a limitation of an estate after a prior one which is to abridge or defeat the first, may be good if created by will as a conditional limitation."⁶⁸

§ 243. **Limitations.** "A limitation may be made to depend on any number of contingencies, even though they may be engrafted on each other, so long as each amounts to a common probability, and so long as they may, according to common probability, grow out of or be connected with each other in the manner specified by the instrument containing the limitation. But a limitation is invalid, when made to depend on a single contingency, if it is made to depend on a remote possibility or when made to depend on two contingencies; if, according to common probability, they do not grow out of and are not connected with each other in the manner specified."⁶⁹

The freehold in the ancestor, and the limitation to his heirs, must be by the same deed or instrument, or they will not consolidate in the ancestor. If he acquires the freehold by one deed, and the limitation to his heirs by another, the limitation will continue, as it originally was, a contingent remainder. But if the estate be limited to A. for life by one deed, and afterwards in his lifetime, to the heirs of his body, under the execution of a power of appointment contained in the same deed, the limitations unite according to the general rule; and on this principle, that a limitation under a power

⁶⁸ In *Cole v. Sewell*, *supra*, Lord St. Leonards (Sir E. Sugden) says: "As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the court, because it is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question; for the given limitation is either a vested remainder, and then it matters not whether it ever vest in

possession, because the previous estate may subsist for centuries, or for all time, or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends happens so that the remainder may vest *eo instanti*, the preceding limitation determines, it can never take effect at all."

⁶⁹ Smith's Ex. Int. secs. 697, 698.

contained in a conveyance to uses, operates as a use created by and arising under the conveyance itself. It is a branch of one and the same settlement. This arises from the retrospective relation which appointments bear to the instrument containing the power.⁷⁰

"When a contingent particular estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only or extends to the whole series. The rule in these cases seems to be that if the ulterior limitations be immediately consecutive on the particular estate, in unbroken continuity, and no intention or purpose is expressed with reference to that estate in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them."⁷¹

But the rule referred to is one of construction, merely, and intended only as a formula for the purpose of classifying cases in which the meaning is gathered from the language of the testator expressing such intention, and is not to be applied to instances in which it appears that the contingency is restricted to the immediate estate. The same author divides those instances into two other classes: "First, Where the words of contingency are referable to and evidently spring from an intention which the testator has expressed in regard to that estate by way of distinction from the others. Secondly, The contingency is restricted to the particular estate with which it stands associated where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts."⁷²

⁷⁰ 4 Kent's Com. 246.

⁷² Id. 831, 832.

⁷¹ 1 Jarm. Wills (5th Am. ed.), by Bigelow, * 831.

§ 244. **Merger.** *Merger* bears a very near resemblance, in circumstances and effect, to a *surrender*: but the analogy does not hold in all cases, though there is not any case in which merger will take place, unless the right of making and accepting a surrender resided in the parties between whom the merger takes place.⁷³ To a surrender, it is requisite that the tenant of the particular estate should relinquish his estate in favor of the tenant of the next vested estate, in *remainder or reversion*. But merger is confined to the cases in which the tenant of the estate in reversion or remainder grants that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to him in reversion or remainder.⁷⁴ Surrender is the act of the party, and merger is the act of the law. The latter consolidates two estates, and sinks the lesser in the greater estate. The merger is co-extensive with the interest merged, as in the case of joint tenants and tenants in common; and it is only to the extent of the part in which the owner has two several estates. An estate may merge for one part of the land, and continue in the remaining part of it.⁷⁵

§ 245. **Rare merits of the New York codification of 1896.** In New York, very deep innovations have been made upon the English system. No valid remainder can be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; and the remainder takes effect when the contingency happens, in the same manner and to the same extent as if the precedent estate had continued. This relieves us in New York, and fortunately and wisely relieves us, from the burden of investigating and following all the inventions and learning calculated to elude the fatal consequences of the premature destruction of the particular estate. But another and more momentous change in the law has annihilated at once all this doctrine of remainders by way of use. Every contingent remainder which, under the English law, is by way of use, is now (1896) in New York, a strictly legal contingent remainder, and governed by the same rules.

⁷³ Preston on Convey. vol. III,
23, 153.

⁷⁴ Id. 25.

⁷⁵ Id. 88, 89.

There is no longer any need of trustees to preserve contingent remainders; and they could not exist if they were necessary, for their duty is not one of the express trusts which may be created. It is declared that every disposition of lands, whether by deed or devise, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other, to the use of, or in trust for such person; and if so made, no estate or interest, legal or equitable, vests in the trustee.

If, by some feat of necromancy the student of the law of real property could but get a glimpse of the stupendous mass of discussion, wise and otherwise, that has found its way into type, he would at once turn with gratitude to the New York revision of 1896, as embodying the most pithy and sententious utterances on this truly perplexing topic of expectancies. The whole range of legal literature cannot afford a more striking instance of apt condensation. And it has received the repeated endorsement of jurists of high repute and of lawyers of the most critical disposition. I append the text as expository of a highly refined subject.

ARTICLE II — CREATION AND DIVISION OF ESTATES IN EXPECTANCY.

Section 25. Estates in possession and expectancy.

26. Enumeration of estates in expectancy.
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Section 39. Limitations of chattels real.

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46. Posthumous children.
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52. Anticipation of directed accumulation.
53. Undisposed of profits.
54. When expectant estates are deemed created.
55. Estates in severalty, joint tenancy and in common.
56. When estate in common; when in joint tenancy.

Section 25. Estates in possession and expectancy.— Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy. An estate which entitles the owner to immediate possession of the property, is an estate in possession. An estate, in which the right of possession is postponed to a future time, is an estate in expectancy.

§ 26. Enumeration of estates in expectancy.— All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into,

1. Future estates, and
2. Reversions.

§ 27. Definition of future estates.— A future estate, is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

§ 28. Definition, remainder.— Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

§ 29. Definition, reversion.— A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

§ 30. When future estates are vested; when contingent.— A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

§ 31. Power of appointment not to prevent vesting.— The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.

§ 32. Suspension of power of alienation. — The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.

§ 33. Limitation of successive estates for life.— Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and on the death of those persons, the

remainder shall take effect, in the same manner as if no other life estates had been created.

§ 34. Remainders on estates for life of third person.— A remainder shall not be created on an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate in a term of years, unless it be for the whole residue of such term.

§ 35. When remainders to take effect if estate be for lives of more than two persons.— When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced.

§ 36. Contingent remainder on term of years.— A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof.

§ 37. Estate for life as remainder on term of years.— No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

§ 38. Meaning of heirs and issue in certain remainders.— Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue," shall be construed to mean heirs or issue, living at the death of the person named as ancestor.

§ 39. Limitations of chattels real.— All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

§ 40. Creation of future and contingent estates.— Subject to the provisions of this article, a freehold estate as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years, and a

remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee or other less estate, may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article.

§ 41. Future estates in the alternative.—Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

§ 42. Future estate valid though contingency improbable.—A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.

§ 43. Conditional limitations.—A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation.

§ 44. When heirs of life tenant take as purchasers.—Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs, or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them.

§ 45. When remainder not limited on contingency defeating precedent estate, takes effect.—When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect, only on the death of the first taker, or the expiration by lapse of time of such term of years.

§ 46. Posthumous children.—Where a future estate is limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parents; and a future estate, dependent on the contingency of the death of any person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.

§ 47. When expectant estates are defeated.— An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.

§ 48. Effect on valid remainders of determination of precedent estate before contingency.— A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterwards happen the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

§ 49. Qualities of expectant estates.— An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession.

§ 50. Dispositions of rents and profits.— A disposition of the rents and profits of real property to accrue and, be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article, for future estates in real property.

§ 51. Accumulations.— All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which

the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

3. If in either case such direction be for a longer term than during the minority of the beneficiaries it shall be void only as to the time beyond such minority.

§ 52. Anticipation of directed accumulation. Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate's court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.

§ 53. Undisposed profits.—When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.

§ 54. When expectant estates are deemed created.—Where an expectant estate is created by grant, the delivery of the grant, and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.

§ 246. **Comments on this codification.** “Here, discarding all the abstruse and refined discussions and disputes as to what constitutes an estate and what a mere possibility or expectation, we have a series of statutory definitions, under which a remainder expectant upon the determination of the estate of a tenant for life is declared to be: First, An ‘estate in expectancy;’ Second, A ‘future estate;’ and it is either vested or contingent.

“If there ‘is a person in being who would have an immedi-

ate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested' within the terms of the statute. It is not 'a person who now has a present fixed right of future possession or enjoyment,' but a person who would have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and say as to him, 'that man or woman by virtue of a grant of a remainder, would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease,' then the statute says he or she has a vested remainder.

* * * "Without enlarging further, the statute rejecting technical expressions and phrases heretofore employed means by the word person just what it expresses and no more. 'When there is a *person* in being,' means when you can point to a human being, man, woman, or child; and 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' means that if you can point to a man, woman, or child who, if the life estate should now cease, would, *eo instanti et ipso facto*, have an immediate right of possession, then the remainder is vested and, by necessary consequence, all the contingencies which may operate to defeat the right of possession are to operate, and only to operate as conditions subsequent." ⁷⁶

Refinements have gradually accumulated, until they have, in a very considerable degree, overshadowed and obscured many parts of the English law of real property, and I am more and more impressed with a sense of the great utility of the provision rescuing contingent remainders, by legislative authority, from all perplexing dependence on the particular estate.

§ 247. **Origin and history of the rule in Shelley's case.** The Shelleyite controversy in the time of Queen Elizabeth has become historical, and it is extremely doubtful if the legal arena has ever witnessed a more protracted or virulent discussion, or one that has enlisted a more formidable array of talent or elicited more critical acumen and analysis.

⁷⁶ Woodruff, J., in *Moore v. Littel*, 41 N. Y. 66.

The earliest intelligible decision upon the subject, however, is to be found in the case of the *Provost of Beverly*, in the time of Edward III, and reported in the Year Books, in which the rule is substantially declared as in Shelley's case. Various theories have been suggested as furnishing a foundation for the rule in the first instance; some authors, with much plausibility, tracing it to the same principle which applied originally to "heirs" when used in a conveyance. "It was at first understood that in case of such a limitation the estate was in fact to go to the heirs of the grantee named; that, though he had a right to enjoy it during life, he had no right to cut off the descent by alienation; and that when, therefore, the word 'heirs' in the progress of estates, came to be regarded as a mere term of limitation, giving the grantee a complete ownership, with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and after his death to his heirs; the effect at common law being the same in both forms of limitation."⁷⁷ Nor does it seem that this result worked any particular hardship to the heir, as in those days ready money was extremely scarce, and the alienation of lands assumed the form of perpetual leases, granted in consideration of certain services or rents reserved to the grantor and his heirs; and, as such services and rents descended to the heir, it was not so great a disadvantage to him as at first might be supposed.⁷⁸

Blackstone says: "Another foundation of the rule probably, was laid in a principle diametrically opposite to the genius of feudal institutions, namely a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor."⁷⁹

In *Polk v. Faris*, 30 Am. Dec. 400, Reese, J., in a very able opinion in vindication of the rule, uses this language: "It is a rule of canon and property, which so far from being at war with the genius of our limitations, or with the liberal and commercial spirit of the age, which alike abhor the locking

⁷⁷ 2 Washb. Real Prop. 647; Wms. Real Prop. 254.

⁷⁹ See also Rawle's note, Wms. Real Prop. 253.

⁷⁸ Wms. Real Prop. 39.

up and rendering inalienable real property and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance, that the rule, a Gothic column found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system."

In *Hileman v. Bouslaugh*, 53 Am. Dec. 474, the distinguished Chief Justice Gibson says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages," etc. It has other than feudal objects, to wit, the unfettering of estates, by vesting the inheritance in the ancestor and making it alienable a generation sooner than it otherwise would be.

That this result accords most thoroughly with the general tendency of juridical evolution is apparent from the progress of the law, and the gradual falling away of entails, and other restraints on alienation, from the times of Henry I to the present. It seems clear that in a highly complex state of society, with greatly diversified industries and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property and that such has been the spirit of the legislation in this State is manifest from a perusal of the various statutes enacted upon the subject. We are not unaware of the fact that in some of the States the rule has been partially, if not wholly abolished. Such legislation was probably influenced by the presumed lack of conformity with the supposed intention of the grantor or testator. But to this it has been answered that "when a case arises, fulfilling the requirements for the application of the rule, it is not against the intention of the testator. It is only applicable when the intention of the testator has been discovered by the ordinary canons of descent."⁸⁰ "The rule is not a means to discover the intention of the grantor or testator, but supposing the intention ascertained, the rule controls it, so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than the more particular and prescribed, intent. The party making such a limitation has in its mind two purposes

⁸⁰ 2 Fearn, Reminders, sec. 434.

which are legally in conflict. One is to give the ancestor only a life estate, the other to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together without more or less of general mischief to the public welfare; and the rule prevails simply to subordinate the particular and apparently less important design, of limiting the ancestor's interest to a life estate to the more comprehensive and probably preferred purpose of transmitting the inheritance in the manner indicated."⁸¹

a. *Theory of the rule.* Theoretically the rule is this: When an estate of freehold is limited to a person, and in the same instrument there is a limitation, either mediate, or immediate, to his heirs or the heirs of his body, the word "heirs" is to be taken as a word of limitation, or, in other words, the ancestor takes the whole estate comprised in these words, if it be to the heirs of his body, a fee tail; if to his heirs, a fee simple.⁸²

By force of the rule, the ancestor took the whole estate, and the heirs, if they took at all, could only take by descent, which of course might be barred by grant or devise. The technical legal principle of the rule was that the words "heirs" or "heirs of the body" created a remainder in fee or in tail, which the law, to prevent an abeyance, vested in the ancestor, who is tenant for life; and by the conjunction of the two estates, he became tenant in fee or in tail.

The word heirs had to be used to make the rule applicable, and the estate of the ancestor had to be a freehold. The words "lawful issue" have been held to have as extensive a signification as heirs of the body.⁸³ If the heirs were designated *nominatim* or as a class, the rule did not apply, nor if the person to take the first estate were deceased.⁸⁴ The rule was also often relaxed in interpreting wills and marriage settlements, and in executory trusts.⁸⁵ If the word "issue" was defined as referring to a certain class, as issue living at the time of the devisee's death, or "children," the rule did

⁸¹ 2 Minor, Inst. 395, cited with approval in *Leathers v. Gray*, 96 N. C. 548.

⁸² 1 Powell on Devises, 429.

⁸³ *Kinsland v. Rapelyea*, 3 Ed. Ch. 1.

⁸⁴ *Brunt v. Gelston*, 2 John. Ca. 384.

⁸⁵ *Tallman v. Wood*, 26 Wend. 9.

not apply.⁸⁶ The origin and polity of the rule arose from the feudal tenure, which favored descents, among other reasons, because if the heirs took as purchasers, the lord would be deprived of certain feudal incidents. By reflecting on this theory of the rule, the rule itself is easily remembered. Upon the abolition of feudal tenures, the reason for the rule no longer existed, but the rule itself remained.

b. *Analysis of Mr. Hayes.* "The rule assumes and founds itself upon two pre-existing circumstances — a freehold in the ancestor, and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it. When the rule supposes the second limitation to be a remainder, it plainly excludes: 1, The case of limitations differing in quality, the one being legal and the other equitable; 2, The case of limitations arising under distinct assurances; and, 3, The case of an executory limitation, by way of devise or use, and, consequently, upon principle, the case of a limitation arising under an appointment of the use; but authority seems to have established an anomalous exception in regard to appointments. Again, as the second limitation must be a remainder to the heirs, it follows that, with limitations to sons, children, or other objects, to take, either as individuals or as a class, under what is termed a *descriptio personæ*, as distinguished from a limitation embracing the line of inheritable succession, the rule has no concern whatever. In order to find whether the second limitation is a remainder to the heirs or not, we must resort to the general rules and principles of law. The rule being a maxim of legal policy, conversant with things and not with words, applies whenever judicial exposition determines that heirs are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term heirs. Thus, even the word children, aided by the context, or the word issue, uncontrolled by the context, may have all the force of the word heirs, and then the rule

⁸⁶ 4 Paige, 345; Id. 293; 3 Sandf. Wend. 503; Campbell v. Rawden, Ch. 64; Christie v. Phyfe, 19 N. Y. 18 N. Y. 412.
344; Post v. Post, 47 Barb. 72; 3

applies; while the word heirs, restrained by the context, may have only the force of the word children, and then the rule is utterly irrelevant. These are preliminary questions, purely of construction, to be considered without any reference to the rule, and to be solved by, exclusively, the ordinary process of interpretation. This point, kept steadily in view, would have prevented infinite confusion.

"The operation of the rule is two-fold: First, It denies to the remainder the effect of a gift to the heirs; Secondly, it attributes to the remainder the effect of a gift to the ancestor himself. It is, therefore, clear that the rule not only defeats the intention, but substitutes a legal intendment directly opposed to the obvious design of the limitation. A rule which so operates cannot be a rule of construction. As a consequence of transferring the benefit of the remainder from the heirs, who are unascertained, to the ancestor, who is ascertained, the inheritance, limited in contingency to the heirs, may become vested in the ancestor; and as another consequence of the same process, the ancestor's estate of freehold may merge in the inheritance.

"The obvious deduction is that in no case does the rule disturb the particular estate of freehold in the ancestor, which estate is left to the uncontrolled operation of ordinary principles, merging, or not merging, according as the remainder, transferred by the rule from the heirs to the ancestor, is absolute or conditional, proximate or remote. The estate of freehold is a circumstance without which the rule is dormant; but the rule, when called into action, exerts its force on the remainder alone. Why that circumstance was selected, we can only conjecture. It is affirmed, indeed, that a limitation to A. for life, with remainder to his heirs, is in truth the same thing as a limitation to A. and his heirs. In the simple cases thus put, the effect, under the rule, aided by the doctrine of merger, is the same, but surely the import is not the same. And how unsatisfactory does this reasoning appear when it is recollected that the rule equally applies where the gift is to A. for life, remainder (interposed), to B. for life, remainder to the heirs of A.; or, to A. *pur autre vie*, remainder to the heirs of A.; or, to A. *durante viduitate*, remainder to the heirs of A.; or, to A. in tail, remainder to

the heirs of A., etc. — cases which need only be mentioned in order to destroy the theory that would form a fee by the union of the two limitations. It is an error, and the fruitful parent of errors, to affirm that the limitations unite or coalesce under the rule, which has discharged its office by simply substituting the ancestor for the heirs in the second limitation.

“When the ordinary rules of construction have ascertained the co-existence of a freehold in the ancestor with a remainder to the heirs, the simplest and surest method of applying the rule is to read the second limitation as a limitation to the ancestor himself and his heirs. This gives at once, and in every possible case, the true result. The effect, universally and constantly, will be the same as if the remainder had been expressly and intentionally limited to the ancestor and his heirs — reading the words ‘and his heirs,’ not (according to the notion referred to at the close of the preceding paragraph), as words of limitation of the estate of freehold before expressly limited to him, but as words of limitation of the estate in remainder attributed to him by the rule.”⁸⁷

c. *Of Chief Justice Gibson.* In *Hillman v. Bouslagh*, 13 Pa. St. 344, Chief Justice Gibson, in an able opinion, gives the rule a most earnest support, and defends the policy of retaining it as a part of the American law of real property. “The rule in Shelley’s case,” says he, “ill deserves the epithets bestowed on it in the argument. It is part of a system; an artificial one, it is true, but still a system, and a complete one. * * * It happily falls in with the current of our policy. By turning a limitation for life, with remainders to the heirs of the body, into an estate tail, it is the handmaid not only of Taltarum’s case, but of our statute for barring entails by a deed acknowledged in court, and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. * * * It is admitted that the rule subverts a particular intention in perhaps every instance; for as was said in *Roe v. Bedford*, 4 Maule & Sel. 363, it is proof against even an express declaration that the heirs shall take

⁸⁷ 1 Hayes, Conv. (5th ed.), 542-546.

as purchasers. But it is an intention which the law cannot indulge, consistently with the testator's general plan, and which necessarily subordinates to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation, by making the general intention subservient to the particular one. The donor is no more competent to make a tenancy for a life a source of inheritable succession, than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property."

Under the "rule in Shelley's case," where it is in force, the word "heirs," when used, must be held to be a word of limitation, and not of purchase. This rule and its application have been fully and elaborately considered and illustrated in *Baker v. Scott*, 62 Ill. 86; *Carpenter v. Van Olinder*, 127 Ill. 42; 2 L. R. A. 455; *Hageman v. Hageman*, 129 Ill. 164.

The rule is said to be a rule of property which overrides even the expressed intention of the testator or grantor that it shall not operate, or which rather raises a conclusive presumption that, where a devise or grant is made to a man and his heirs, the testator or grantor intended to use the word "heirs" as a word of limitation, and not of purchase. Thus, in the language of Preston on Estate, quoted and adopted by us in *Carpenter v. Van Olinder*, *supra*: "Neither the expressed declaration, first, that the ancestor shall have an estate for his life, and no longer; nor, secondly, that he shall have only an estate for life in the premises, and after his decease it shall go to the heirs of his body, and, in default of such heirs, vest in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator; nor, thirdly, that the ancestor be tenant for his life, and no longer, and that it shall not be in his power to sell, dispose or make away with any part of the premises — will change the word 'heirs' into a word of purchase."

d. *Of Chancellor Kent*. "The judicial scholar, on whom his great master, Coke, has bestowed some portion of the 'glad-some light of jurisprudence,' will scarcely be able to withdraw an involuntary sigh, as he casts a retrospective glance over the piles of learning devoted to destruction by an edict

as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism, and refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in *Perrin v. Blake*, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearn, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have therefore written on this subject, may be considered, as far as my native State is concerned, as an humble monument to the memory of departed learning."⁸⁸

And so it continued to be until the revisers lately recommended its abolition as being a rule "purely arbitrary and technical," and calculated to defeat the intentions of those who are ignorant of technical language.

In *Kingsland v. Rapelye*, decided by the vice-chancellor, in the city of New York (1834), and in *Schoonmaker v. Shelley*, decided in the New York Circuit Court for the Second circuit, in 1841, upon wills made prior to the operation of the Revised Statutes of 1830 in that State, the rule in Shelley's case was recognized, and strictly applied and enforced.⁸⁹ The words lawful issue were held to have as extensive a signification as heirs of the body. The New York Revised Statutes⁹⁰ have accordingly declared that "where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the ter-

⁸⁸ 4 Kent's Com. 267.

⁹⁰ Vol. i. 725, sec. 28.

⁸⁹ 3 Edward's Ch. Rep. 1.

mination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them." Such is now the statute law of Virginia." The abolition of the rule applies equally to deeds and wills; and in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders. It sacrifices the paramount intention in all cases, and makes the heirs instead of the ancestor the stirps or terminus from which the posterity of heirs is to be adduced. It will tie up property from alienation during the lifetime of the first taker, and the minority of his heirs. But this, it may perhaps be presumed, was the actual intention of the party, in every case in which he creates an express estate for life in the first taker, for otherwise he would not have so limited it."

e. *Of Mr. Preston.* We held in *Baker v. Scott*, 62 Ill. 88, that the rule in Shelley's case is in force here, as a rule of property, and that the question of intent in determining whether it is applicable in a given case does not turn upon the quantity of estate intended to be given to the ancestors, but upon the nature of the estate intended to be given to the heirs, and it was shown in that case that in the great case of *Perrin v. Blake*, 4 Burr. 2579 (3 Greenl. Cruise, Real Prop. 313), as finally decided in the Exchequer Chamber, it was admitted that the rule in Shelley's case often defeats the undoubted intention of the deviser, "for," it was said, "there was never an instance where the estate for life was expressly devised to the first taker that the deviser intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention and vests the remainder in the ancestor."

Preston, in his work on Estates, says in vol. 1, pages 281, 283, speaking of the legal effect under the rule in Shelley's case of the word "heirs" in a grant or devise, "that all possible heirs of the given description are to take in succession from generation to generation under the name of heirs of the ancestor, is to bring the case immediately within the

⁹¹ Rev. Stat. 1849, tit. 33, ch. 116,

⁹² 4 Kent's Com. 265.

rule. That only one individual or several individuals is or are to take in the characters of heirs, or rather as particular persons described by that name, either for their lives only or for an estate of inheritance to be deducible from them as the stock or ancestor; and that their heirs are described by superadded words of limitation, and as their descendants, is to exclude the rule." And, again, in the same volume, at pages 362, 363, this author says: "In wills the rule" (i. e., in Shelley's case), "applies generally and without exception to the several limitations as often as the gift to the heirs is without any expression of qualification;" and he thus illustrates his meaning: "Neither the expressed declaration (1) that the ancestor shall have an estate for his life and no longer, nor (2) that he shall have only a life estate in the premises, and that, after his decease, it shall go to the heirs of his body, and in default of such heirs vest in the person next in remainder; and that the ancestor shall have no power to defeat the intention of the testator; nor (3) that the ancestor shall be a tenant for his life and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises, will change the word 'heirs' into a word of purchase."

Kent says, vol. 4, p. 233, 8th ed., in speaking of the decision of the Exchequer Chamber in *Perrin v. Blake*, *supra*: "The result of that famous controversy tended to confirm by the weight of judicial authority at Westminster Hall, the irresistible pre-eminence of the rule (i. e., in Shelley's case), so that even the testator's manifest intent could not control the legal operations of the word heirs when standing for the ordinary line of succession as a word of limitation, and render it a word of purchase. If the term heirs, as used in the instrument, comprehended the whole class of heirs, and they became entitled, on the death of the ancestor, to the estate, in the same manner and to the same extent and with the same descendible qualities as if the grant or devise had been simply to him and his heirs, then the word heirs is a word of limitation, and the intention will not control the legal effect of the word. The term must be used as a mere designation of one or more individuals or a new import given to it by superadded or ingrafted words of limitation,

varying its sense and operation, in order to make it a word of purchase."

f. *Repudiation of the rule in several States.* In New York the revisers of the statutes in 1830 recommended the abolition of the rule as being one "purely arbitrary and technical, and calculated to defeat the intentions of those who are ignorant of technical language." The New York Revised Statutes have accordingly declared that where a remainder shall be limited to the heirs, or heirs of the body of a person, to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body, of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them.

The practical operation of the abolition of the rule is, in cases where the rule would otherwise apply, to change what would, under the rule, be a fee, into a precedent estate and remainder. A devise, therefore, or grant, since the Revised Statutes of 1830, to A. for life, and after his decease to his heirs and assigns forever, would give the heirs a vested interest in the land, subject to open and let in after born children; the interest of each, however, being liable to be defeated by his death before the first taker.⁹³

The rule in Shelley's case yields to a clear intention of the grantor, and was not adopted with a view to gratify the intention of the settler, but it was adopted from feudal consideration to merge the life estate in the inheritance, and it frequently, if not always, disregarded or annulled the intention, however clearly expressed, to give a life estate only to the ancestor. Lord Mansfield clearly shows that the rule arose from feudal considerations.⁹⁴

That this was the origin and reason of the rule, appears by all the writers on it, especially 1 Prest. Est., 272.

And Mr. Preston, in the most decided manner, condemns the rule, because it is subversive of the intention.⁹⁵

The Supreme Court of the United States have emphatically declared their purpose to respect the lawful intention of the

⁹³ 3 R. S. 12.

⁹⁵ 1 Prest. Est. 300.

⁹⁴ 2 Burr. 1106.

donor in all instruments, regardless of any opposing rule of law, however ancient.⁹⁶

As the Supreme Court in 2 How. 55, refers approvingly to the opinions of Mansfield, Hardwicke and Buller, we call attention specially to the masterly arguments of these great judges in 2 Burr. 1107; 2 Atk. 578; 2 Ves. 655.

All the authorities in England and America unite in excluding the rule in Shelley's case, where the estate limited to the ancestor and his or her heirs, general or special, are not both legal or equitable.

While it is a rule of law too firmly established to be shaken by the courts, and which the courts should enforce, not because it is just or wholesome, but because it is law, yet its operation more frequently defeats the just and undoubted intention of grantors and testators than any other effect it has. For this reason the courts everywhere are inclined to circumscribe its operation within the strict limits of its own boundaries.

g. Comments on the rule. This celebrated decision, which has agitated the legal minds of two centuries, is very generally discredited in the United States. In most of them it is a mere tradition, although Pennsylvania, Maryland, Indiana, and provisionally, Vermont, still cling to a semblance or shadow of the rule. It is exceedingly doubtful if any equity court in this country would enforce its provisions in an extreme case, and it is certain that it is very generally regarded rather as a *rule of construction* than as a rule of law, that is to say, its rigors are abated in all instances when its enforcement would contravene the manifest intention of the testator.⁹⁷

Where a deed or a will uses the word "heirs" and uses it in its ordinary legal signification, a fee is vested in the first taker. This is the effect and force of the rule in Shelley's case, 1 Co. 88, and that rule enters into our law as a rule of property.⁹⁸

The rule in Shelley's case is based upon the idea that there is in the mind of the maker of the instrument, that

⁹⁶ Shriver v. Lynn, 2 How. 55.

Austin v. R. R. Co. 45 Vt. 215;

⁹⁷ Millet v. Ford, 109 Ind. 159;

Rice's Probate Law, 169.

Belslay v. Engle, 107 Ill. 182; Henderson v. Henderson, 64 Md. 185;

⁹⁸ Maxwell v. Featherston, 83 Ind. 339.

comes under its operation, two intents, one a paramount or general, or legal intent as it is called, and the other a particular or prescribed intent, and if both intents cannot have effect, the latter must yield to the former."⁹⁹

It is a rule of construction, that when technical words or phrases are used, nothing else appearing, they must be taken in their technical sense, and when the words "heirs" or "heirs of the body" are used alone, without anything to show that they were not so intended, the technical meaning must prevail, because, standing alone, there can be no other certain meaning given to them; but it has been held and is settled in North Carolina that superadded words "equally to be divided" and like qualifying words which show that they were not used in a technical sense, will prevent the operation of the rule in Shelley's case.¹⁰⁰

Whatever in the past may have been the value of the rule in Shelley's case, I think it should be strictly construed when otherwise it would defeat the manifest intention of the testator. I think the tendency of modern decisions in America is to limit its operations to cases that come strictly and technically within the rule, and in many of the States it has been abolished by statute. It is a rule by which the meaning of the testator is construed, and when this meaning is clear I do not see why it should be defeated by a too liberal construction of a rule of construction.¹⁰¹

As much as the memory of Coke is to be venerated for his great legal learning, I think, with all his faults, if not crimes, while attorney-general, his services in behalf of popular rights and civil liberty in resisting the encroachments and tyranny of the house of Stuart, entitle him to far more lasting fame than did his services in the legal war carried on by the bench and the bar between the "Shelleyites" and the "anti-Shelleyites."¹⁰²

In Indiana the rigidity with which the rule has been applied elsewhere seems to have been somewhat relaxed;

⁹⁹ See the question discussed by Pearson, J., in *Ward v. Jones*, 5 Ired. Eq. 400; see also the authorities cited in 96 N. C. 548.

¹⁰⁰ *Mills v. Thorne*, 95 N. C. 362,

and authorities there cited; *Chambers v. Payne*, 6 Jones' Eq. 276.

¹⁰¹ *Rice's Probate Law*, 170.

¹⁰² *Leathers v. Gray*, 101 N. C. 162, p. 72, per Davis, J.

and it has been held that the word "issue" in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise, and the apparent intention of the testator. There can be no doubt that where the testator manifests an intent to give the first taker only an estate for life, and uses the word "issue," "sons," "children," or "descendants," the case will be withdrawn from the operation of the rule. And in regard to all executory trusts, it is undoubtedly true that in courts of equity the rule will be adhered to only in cases literally within it, and that where circumstances take the case out of the letter of the rule, it will be held subservient to the manifest intention which led to the creation of the trust.¹⁰³

In *Allen v. Pass*, 4 Dev. & Bat. 77, Judge Gaston used the following language: "Before the application of the rule in Shelley's case, it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the heirs, or to the heirs of the body, of one to whom a precedent estate is given — such a limitation does not exist when the limitation is to them in the quality of heirs — embracing the same number — in succession of objects and conferring the same extent of interest as would be embraced and conferred when the inheritance has been limited to the ancestor." He proceeds to say that when these requisites are embraced in the terms of a devise, the rule in Shelley's case applies. But, he adds, "On the other hand, as the law will not entrap men by words incautiously used, if the limitation of a remainder by any instrument of conveyance, the phrase 'heirs,' or 'heirs of the body' be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description — it shall have the same operation the words would have, of which it is the representative; there is not in fact a limitation to heirs, and, of course, there is no room for the application of the rule."

¹⁰³ *Lyles v. Digges*, Lessee, 6 H. 320; 4 Kent's Com. 240; *Rice's & J.* 364; *Horne v. Lyeth*, 4 Id. Probate Law.
431; *Dickson v. Satterfield*. 53 Md.

And in the more recent case of *Ward v. Jones*, 5 Ired. Eq. 400, Chief Justice Pearson says: "The rule in Shelley's case only applies where the same persons will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seignories, and to the rights of creditors, that the first taker should have an estate of inheritance; but where the persons taking by purchase would be different, or have different estates, then they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, take as purchasers."

This court has held that, as the common law has been adopted by statute in this State, the rule in Shelley's case is binding upon the courts as a law of real property, and has applied such rule in the construction of devises.¹⁰⁴ While we might not agree to the application of the rule in Shelley's case to testamentary construction, if the question could be regarded as an open one, yet we would feel constrained, in a proper case, to adhere to our previous decisions.

In the well considered case of *McMahon v. Newcomer*, 82 Ind. 565, in speaking of the application of the rule in Shelley's case to the construction of a devise of real property, the court says: "A fee will pass if, taking all the provisions of the will together, it is clear that the testator intended to vest such an estate in the devisee."¹⁰⁵ It is settled by law that the rule in Shelley's case will not be allowed to defeat the plain intention of a testator."¹⁰⁶

The rule in Shelley's case will not, in any case, be allowed to override the manifest intention of the testator, where such intention is neither lawful nor inconsistent with the established rules of law. Whenever it is certain that the term "heirs" is used with the intention that they should take as children or as purchasers, the will should be so construed.¹⁰⁷

¹⁰⁴ *Siceloff v. Redman*, 26 Ind. 251; *McCray v. Lipp*, 35 Id. 116; *Gonzales v. Barton*, 45 Id. 295.

¹⁰⁵ 4 Kent's Com. 535; *Smith v. Meiser*, 51 Ind. 419.

¹⁰⁶ *Doe v. Jackman*, 5 Ind. 283;

Siceloff v. Redman, 26 Id. 251; *Helm v. Frisbie*, 59 Id. 526; sec. 2567, R. S. 1881.

¹⁰⁷ *Rapp v. Matthias*, 35 Ind. 332; *Brown v. Harmon*, 73 Id. 412; *Clifford v. Farmer*, 79 Id. 529; *Jones v.*

It is firmly established by the decisions, that the rule in Shelley's case is the law of Indiana. In one case the court declared and enforced this rule, but expressed the hope that it might be changed by legislation, avowing that it was not within the power of the court to change it, much as the court doubted its wisdom and justice.¹⁰⁸ But the rule has been so repeatedly and emphatically declared to be a rule of property, that it is no longer a question as to its binding force upon the courts of the State.¹⁰⁹

Mr. Fearne states the rule very strongly, perhaps too strongly, for he says that the most positive directions will not defeat the operation of the rule in Shelley's case.¹¹⁰

Judge Sharswood, in delivering the opinion of the Supreme Court in *Ingersoll's Appeal*, 86 Pa. St. 240, 245, said: "Nothing, certainly, is better settled than that the intention of a testator, if not contrary to law, shall be carried out in the disposition he may make of his property after death. There are many things which he cannot do, however clearly he may intend it. He cannot create a fee and clog the power of alienation or relieve it from liability for debts. He cannot create a perpetuity by an executory devise after an indefinite failure of issue or at any other future period, which may not be until after a life or lives in being and twenty-one years." The same learned judge, in *Doebler's Appeal*, 64 Pa. St. 9, at page 15, said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be

Miller, 13 Id. 337; see also Hileman v. Bouslaugh, 13 Pa. St. 344; Rice's Probate Law, 172.

¹⁰⁸ Sicheloff v. Redman, 26 Ind. 251; see p. 259.

¹⁰⁹ Hochstedler v. Hochstedler, 108 Ind. 506; Fountain County, etc., Co. v. Beckleheimer, 102 Id. 76, 52 Am. Rep. 645, and authorities cited,

p. 77; Schimer v. Mann, 99 Ind. 190, 50 Am. Rep. 82; Ridgeway v. Lamphear, 99 Ind. 251; Biggs v. McCarty, 86 Id. 352, 44 Am. Rep. 320; McCray v. Lipp, 35 Ind. 116; Andrews v. Spurlin, 35 Id. 262; Doe v. Jackman, 5 Id. 283.

¹¹⁰ 2 Fearne on Remainders, sec. 453.

exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him instead of construing that which he has made."

In *Bender v. Fleurie*, 2 Grant, Pa. 345, the testator gave to his daughter certain lands in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use." This was held to be clearly an estate tail, within the rule, and it was said by the court: "But, it is said, the testator did not mean to give her an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give her but a life estate *voluit (sed) non dixit*, we must take what he said, not what he meant. * * * But no court in this State nor in England has ever treated the phrase 'heirs of her body,' as words of purchase, when they are used with reference to the issue of a devisee, to whom a life estate is given. They are words of limitation, and as such they create an estate tail in the first taker, which cannot be cut down even by the clearest expressions of a desire that it shall be a life estate only."¹¹¹

In a work declared by the Supreme Court of Pennsylvania, in *Hileman v. Bouslaugh*, 13 Pa. St. 344, to be a "masterly disquisition," it is written: "The requisite limitation to the ancestors and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not — whether the author of the limitations intended it to be applied or not. We might as well ask whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exceptions."¹¹²

Stronger still is the expression of the rule in *Walker v. Vincent*, 19 Pa. St. 369, for it was there said: "The law does not pretend to carry out the intention of the testator in all cases; for many testators show a very clear intention to shackle the estates granted by them to a dergee that is wholly

¹¹¹ Rice's Probate Law, 173.

ing Dispositions of Real Estate, 96

¹¹² Hays' Principles for Expound- (7 Law Libr. 52).

incompatible with any real enjoyment of them, and which the law does not allow. * * * The great merit of the rule in Shelley's case is, that it frustrates, and is intended to frustrate, unreasonable restrictions upon titles; for when an estate is declared to be a fee simple or fee tail, it is at once made subject to a limitation in its proper form, no matter how clear may be the testator's intention to the contrary."

It may be further observed that the rule in Shelley's case is by no means the only principle of law which may thwart the intention of the grantor or testator in the interest of public policy, as, for instance, the intention cannot change the rule against perpetuities, nor impose a general restraint upon alienation. If the views of eminent jurists and authors be sound, there is certainly no reason for looking upon the rule with disfavor; but, on the contrary, it is highly useful, and should be jealously guarded and preserved.

Coke's mind had not expansion enough to comprehend a great scheme and the rule has remained to torture the profession through three hundred years of travail while it operated from start to finish as a boomerang and frustrated the efforts of the very class who were supposed to have been embraced within its protection — indeed the "Brahmanical" caste of Great Britain has been most unconscionably mulched by the incessant litigation that has attended the propagation of the rule. Only the strongest necessity can vindicate such a measure and that certainly never existed.

§ 248. Future or contingent uses. Contingent uses are sometimes limited to take effect as remainders, and remainders, whether vested or contingent, may be limited by way of use as well as by way of conveyance. Indeed, it may be said, that this is the usual manner in which they are created. Contingent, shifting, and springing uses presented a method of creating a future interest in land, and executory devises owed their origin to the doctrine of shifting or springing uses. But uses differ from executory devises in this respect; that there must be a person seized to the uses when the contingency happens, or they cannot be executed by the statute. If the estate of the feoffee to such uses be destroyed by alienation or otherwise, before the contingency arises, the

use is destroyed forever; whereas, by an executory devise, the freehold is transferred to the future devisee. Contingent uses are so far similar to contingent remainders, that they also require a preceding estate to support them, and take effect, if at all, when the preceding estate determines. The Statute of Uses meant to exclude all possibility of future uses, but the necessity of the allowance of free modifications of property introduced the doctrine that the use need not be executed the instant the conveyance is made, and that the operation of the statute might be suspended until the use should arise, provided the suspension was confined within reasonable limits as to time.¹¹³

§ 249. Of shifting and springing uses. A use may be limited to arise on some future event without any preceding estate to support it, and hence the happening of the event, which may be either certain or uncertain, calls the estate into being. In all cases of springing use, the estate reposes in the original proprietor until the use rises. And it never takes effect in derogation of any preceding interest. If a grant be to A. in fee to the use of B. in fee after the first day of January next, this is an instance of a springing use, and no use arises until the limited period. The use in the meantime results to the grantor who has a determinable fee. A springing use may be limited to arise within the period allowed by law in the case of an executory devise. And, by means of powers, a use with its accompanying estate, may spring up at the will of any given person.¹¹⁴ Shifting or secondary uses take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it. Thus, if an estate be limited to A. and his heirs, with a proviso that if B. pay to A. one hundred dollars by a given time, the use of A. shall cease, and the estate go to B. in fee. The estate is vested in A. subject to a shifting or secondary use in fee in B.¹¹⁵

Shifting or secondary uses are such as take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some per-

¹¹³ 4 Kent, 332.

¹¹⁴ 4 Kent's Com. 298.

¹¹⁵ Id.; Proprietors, etc. v. Grant,
3 Gray (Mass.), 142.

son named in the deed. * * * The doctrine of shifting or secondary uses furnished a means of evading the principle of the common law, that a fee could not be limited after a fee.

Springing uses are limited to arise in a future event, where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the meantime. A grant to A. in fee, to the use of B. in fee, after the first day of March next, is an instance of a springing use, and no use arises until the limited period. The use in the meantime results to the grantor, who has a determinable fee. By means of powers a use, with its accompanying estate, may be made to spring up at the will of any given person. Springing uses may be raised by any form of conveyance; but in the common law conveyances, which operate by transmutation of possession, the estate must be conveyed, and the use be raised, out of the seizin created in the grantee by the conveyance; while, in covenants to stand seized and conveyances by bargain and sale, the use is severed out of the grantor's seizin and executed by the statute.

Future or contingent uses are limited to take effect as remainders, and are subject to the same rules as contingent remainders.¹¹⁶

These springing and shifting uses originate and propagate a great deal of unnecessary confusion. If we could only preserve the distinct line of cleavage between a shifting use, which is sometimes called a conditional limitation, and a contingent remainder, we shall have made considerable advancement. A conditional limitation is said to be created either by force of the Statute of Uses or the Statute of Wills. If under the first, it is a shifting use. If under the latter, it is an executory devise. Hence, with all the pomp of syllogistic reasoning the English pundits tell us that an executory devise and a shifting use are both conditional limitations. And a conditional limitation is a certain form of remainder. And that all remainders are vested, contingent or cross.¹¹⁷

¹¹⁶ Martindale on Conveyancing, secs. 133-135.

¹¹⁷ See *Batley v. Hopkins*, 6 R. I. 445.

The various necessities of mankind induced the judges to depart from the rigor and simplicity of the rules of the common law, and allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made; but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the ancient use shall remain in the original grantor; as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them, or to the use of A. and his heirs till B. shall pay him a sum of money, and then to the use of B. and his heirs. Which doctrine, when devised by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favor of executory devises. But herein these, which are called contingent or springing uses, differ from an executory devise; in that there must be a person seized to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever, whereas by an executory devise the freehold itself is transferred to the future devisee. And in both these cases, a fee may be limited to take effect after a fee.¹¹⁸

A clear deduction from the foregoing summary is this: future or contingent uses are, in certain instances, limited to take effect as remainders. And, hence, the pertinency of this review. The student anxious for a more minute analysis is referred to Mr. Preston's Abstracts of Title, vol. 1, 105, 106, 107, and to Lord St. Leonard's note to his edition of Gilbert on Uses. In conclusion let it be remembered that our courts construe all future estates no matter how created, as remainders even in case they are limited as uses. These future or contingent uses, that form the title of the present section, are regarded as "contingent remainders" but remainders that are specifically designated as "executory de-

¹¹⁸ 2 Bl. Com. 334.

vises." Without anticipating the discussion of these "executory devises," which will form the subject of a subsequent chapter, it may be well to state that they are nothing more than remainders created by will. Concisely then, future uses (springing, shifting or contingent), are the same thing substantially as "executory devises," and executory devises, in their turn, are simply peculiar forms of remainders. It would be quite logical to amplify the rules and doctrines of executory devises under the general head of remainders. But as a preference exists in favor of Sir Edward Sugden's method of treatment, I yield to a view that may be of little consequence.¹¹⁹

If we were called upon to state, in an epitomized form, just what springing and shifting uses effect in the law of real property, I would say they permit ulterior estates, or, in other words, estates in expectancy, to be created upon the defeasance of a prior or particular estate in the same property.

¹¹⁹ The original intent of the statute of Henry VIII, as previously noted, was to annihilate the jurisdiction of equity over landed estates by giving actual possession at law to the same person who was beneficially entitled to receive the estate in equity, leaving only a legal estate cognizable as such in a court of law. The court of chancery entirely frustrated this intention. (*Beckwith v. Rector*, etc., 69 Ga. 574.) Kent says "the wants and convenience of mankind have triumphed over that intention, and the beneficial and ostensible ownership of estates were kept as distinct as ever." But during the protracted struggle that followed the parliamentary enactment, there were imported into the rules of law many equitable doctrines, and, conversely, many complex and modified interests were engrafted upon the doctrine of uses, as is shown by their classification into

shifting or secondary, springing and future, or contingent and resulting. These are only the refinements that have been engrafted upon what we may generally term future uses. For instance, Burrill says a shifting use is one made to shift or change from one person to another, by matter *ex post facto* (of after occurrence). As if an estate be limited to the use of A and his heirs, with proviso that when B returns from Rome, the land shall be to the use of C and his heirs; here, on the return of B, the use changes or shifts from A to C, and is hence called a shifting use. (See 1 Steph. Com. 503.) These shifting uses are common in all settlements; and in marriage settlements, the first use is always to the owner in fee till the marriage, and then to other uses. The fee remains with the owner until the marriage, and then it shifts as uses arise. (4 Kent's Com. 297.)

§ 250. **Suggestions from Prof. Walker.** "As to the law of remainders, we have seen that this immense fabric has been built upon reasons which no longer exist. It is, perhaps, well to allow men to make future limitations of their property, within the boundaries prescribed by the statute against perpetuities; and if so, it is certainly desirable that this should be done in the most [simple and certain manner; whereas, the present law of remainders is, beyond any other branch of law, complicated and uncertain. Now a single enactment would, in a great measure, remove this objection. It is only necessary to apply to remainders created by deed, the present doctrines of executory devises, or, in other words, to give to deeds the same capacity of future operations that wills already have, and to this there can be no inherent objection. The main prop of the present fabric, as we have heretofore seen, is the particular estate which precedes the remainder. By the reform proposed, this prop being withdrawn, the fabric itself would be dispensed with. While at the same time, the object of creating remainders would be equally well attained, and in a far simpler manner."¹²⁰

¹²⁰ Walker's American Law, p. 835.

CHAPTER XV.

REVERSIONS.

- SEC. 251. The term defined.
252. Views of Chancellor Kent.
253. Distinction between reversion and reverter.
254. The phrase "possibility of reverter" examined.
255. Incidents of reversions.
256. Sale of reversionary interest.
257. Incumbrance of reversions.
258. Reversions in land held by corporations.

§ 251. The term defined. A reversion is literally a returning of land into the possession of the donor, or his heirs, after the gift is ended.¹ The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.² Thus, where a lease for life or years is made by a person seized in fee, the reversion or residue, of the fee continues in the lessor, and, on the expiration of the lease, the possession returns to him.³

¹ Co. Litt. 142b.

² 2 Bl. Com. 175.

³ Mr. Stephen, in his Commentaries, substitutes, in place of Blackstone's definition, the following: "An estate in reversion is where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived; the latter interest is called the particular estate (as being only a small part or particular of the original one), and the ulterior interest, the reversion." (1 Steph. Com. 290.) The Revised Statutes of New York have defined a reversion to be "the residue of an estate left in the

grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised." (1 Rev. St. [723], 718, sec. 12; Burrill's Law Dict., tit. Reversion.)

Challis' definition (Real Prop. 58) is: "A reversion without any express act of the grantor or settler is left in him by the operation or construction of law, when he merely parts with less than his whole estate, retaining in himself a residue which awaits the determination of that with which he has parted, before it can become the estate in possession."

Reversions result invariably from operation of law. In this they are distinct from remainders which are always created by express act of the parties. And, again, another distinction is always prominent, viz., remainders are never limited to the grantor, while reversions are invariably reserved to him or his heirs. Briefly, a reversion is something reserved. A remainder is something granted.

§ 252. **Views of Chancellor Kent.** The doctrine of reversions is said, by Sir William Blackstone, to have been plainly derived from the feudal constitution. It would have been more correct to have said that some of the incidents attached to a reversion were of feudal growth, such as fealty, and the varying rule of descent between the cases of a reversion arising out of the original estate, and one limited by the grant of a third person. Reversion, in the general sense, as being a return of the estate to the original owner, after the limited estate carved out of it had determined, must be familiar to the laws of all nations who have admitted of private property in land. The practice of hiring land for a limited time, and paying rent to the owner of the soil (and which is one of the usual incidents to a reversion), was not only known to the Roman law, but it was regulated in the code of the ancient Hindoos.

The reversion arises by the operation of law and not by deed or will; and it is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment. It is an incorporeal hereditament, and may be conveyed, either in whole or in part, by grant, without livery of seizin. A grant of the reversion of an estate, absolutely or by way of mortgage, passes the rights to rents that subsequently became due as incident to the reversion, but not the rents then in arrears. Reversions expectant on the determination of estates for years, are immediate assets in the hands of the heir; but the reversion expectant on the determination of an estate for life, is not immediate assets during the continuance of the life estate, and the creditor takes judgment for assets *in futuro*. If the reversion be expectant on an estate tail, it is not assets during the continuance of the estate tail; and the reason assigned is, that the reversion is of little or no

value, since it is in the power of the tenant in tail to destroy it when he pleases.⁴

§ 253. **Distinction between remainders and reversions.** A careful analysis of the law governing remainders will disclose this distinction. By remainder the estate goes to a third party upon the determination of the particular priority, while by a reversion the property reverts to the original donor. Again, between the owner of the particular estate and the remainderman no tenure whatever exists; while between the owner of the particular estate and the owner of the reversion a tenure with all its incidents is established. It is also well settled as to remainders, that they can only be acquired by purchase, never, under any circumstances, by descent.⁵

§ 254. **The phrase "possibility of reverter" examined.** While expectant estates, according to Chancellor Walworth, include every present right or interest, either vested or contingent, which may by possibility vest at a future day," yet they do not include the mere possibility of a reverter which the grantor has after he has conveyed in fee. In such a case he has no present right or interest whatever. Suppose a fee simple, without a reservation of rents is granted upon a condition subsequent. There is no estate remaining in the grantor — simply a possibility of reverter. And this

⁴ Kent's Com. 402.

⁵ See opinion of Mr. Justice Bell in *Dennett v. Dennett*, 40 N. H. 498.

"While a reversion could not exist after the old fee simple conditional, this was changed by the statute *De Donis*, after which, in harmony with the common-law doctrine of estates, there remained an estate of reversion in the donor of an estate tail. An estate in reversion cannot exist expectant upon an estate in fee. This follows from the theory of the common law as to the division of the ownership into estates. There may, however, be a

possibility remaining in the grantor of a qualified fee of a return of the fee. This is not a reversion nor an estate in reversion; it is properly called a possibility of reverter, or a reverter. According to the latest and best opinion, qualified fees and with them possibilities of reverter have ceased to exist in England and in those States in which the Statute of *Quia Emptores* is in force. In Pennsylvania and South Carolina, where the statute is not in force, possibilities of reverter may exist." (21 Am. & Eng. Encyc. Law, p. 345.)

possibility is not accorded the status of an estate. It is not even a possibility coupled with an interest, but a bare possibility alone. It has been said that these possibilities were assignable in equity, but this theory cannot be sustained in the face of modern adjudications.⁶ On the other hand, it is said that if this possibility of reverter be coupled with an interest, as when a person who is to take upon the happening of the contingency is ascertained and fixed, such a possibility may be released, devised, or assigned like any other future estate in remainder.⁷ It will be readily admitted that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, are both devisable and of course assignable. But, as shown by Mr. Justice Parker, in *Nicoll v. N. Y. & E. R. R. Co.* (12 N. Y. 121), if the person is not ascertained, they are not possibilities coupled with an interest — it would seem that certainty as to the person who is to ultimately take, is the controlling factor in determining whether a possibility is coupled with an interest.

It has been assumed, that where one grants a base fee in land there is no reversion remaining in him. But if the determinability of the fee depend upon an event which, by the laws of nature, must happen at some time, as an estate to A. and his heirs, so long as a certain tree stands, it would seem that there would be a reversion in the grantor. In one of the cases the court call such an interest as this a "possibility of reverter," but they all agree that it is not an interest which can be limited by way of remainder. Whereas, if the estate were granted to A. and his heirs, till B. returns from Rome, it would create a possibility of reverter, and not a reversion, for if B. were to die at Rome, the estate in A. would become absolute and indeterminable. So, if A. sell land to a banking company, and they hold it till their charter expires, it will revert to him or his heirs. But such a right is not a reversion, it is a naked possibility of reverter which he could not convey or assign.⁸

⁶ See 4 Kent's Com. 262, note b.; *Jackson v. Waldron*, 13 Wend. (N. Y.) 178. And particularly *Nicoll v. N. Y. & E. R. R. Co.* 12 N. Y. 121.

⁷ *Fortescue v. Satterthwaite*, 1 Ired. 570.

⁸ 2 Washb. Real Prop. 687.

All that remains in the grantor after conveying a determinable fee is a possibility of reverter.⁹

No reversion remains and no valid remainder can be limited upon such estate.¹⁰

Determinable fees are divisible into two classes, according to the future event which may determine them. 1, Is an event which admits of becoming impossible to happen; such as the marriage of C. D., which may become impossible by C. D.'s death; or, 2, Is an event which must forever, if it does not actually happen, remain liable to happen; such as the fall of a particular building. In the former case, if the event has not happened before the death of C. D., the determinable fee is by his death *ipso facto* enlarged into a fee simple. In the latter case the determinable fee can never be enlarged into a fee simple, except by a release of the possibility of reverter.¹¹

The happening of a future event *ipso facto* determines the estate without any entry or claim by the person entitled to the possibility of reverter.¹²

§ 255. **Incidents of reversions.** A reversion will be at once recognized as an incorporeal hereditament capable of conveyance in whole or in part.¹³ The incident of rent may be expected from the transfer of the estate, and conversely, the rent may be assigned without the reversion.¹⁴ If the reversion is expectant on a freehold estate, the incidents of dower and curtesy will not attach. But if the reversion is expectant upon an estate for years or any estate less than a freehold, the incidents of dower and curtesy attend it, and will be always recognized.¹⁵ If the reversion and the preceding estate upon which it depends unite in one and the same person, and there are no particular equities that would suggest a separation of the estates, merger, in the reversion of the

⁹ Brattle Square Church Proprs. v. Grant, 3 Gray (Mass.), 142; Hunter v. Middleton, 13 Ill. 50.

¹⁰ 1 Hilliard, Real Prop. (3d ed.) 563; Brattle Square Church Proprs. v. Grant, *supra*; Ayres v. Falkland, 1 Ld. Raym. 325.

¹¹ Challis, Real Prop. 200.

¹² Id. 197.

¹³ Miller v. Miller, 10 Met. (Mass.) 393.

¹⁴ Demarest v. Willard, 8 Cow. (N. Y.) 206.

¹⁵ Durando v. Durando, 23 N. Y. 331; Arnold v. Arnold, 8 B. Mon. (Ky.) 203; Otis v. Parshley, 10 N. H. 403.

particular estate — the greater swallowing up the less — will follow.¹⁶ So, too, the interests of the reversioner are sufficient to support an action for waste in case the owner of the particular estate attempts irreparable mischief.¹⁷ And in general we may say that all of the legal incidents that repose in a remainderman will also be found in a reversioner. We must always keep in mind the fact that these reversions we are now discussing are only a certain form of remainders.

The reversioner may have an action of waste against the tenant in dower or tenant by the curtesy, and upon waste proved, may be put into immediate possession. Such reversioner may alienate his interest or mortgage it, or charge it with his specialty debts. It is, therefore, an estate, an interest in the land, obtained by the inheritance, by the descent cast, and by force of the rules of law operating upon and giving effect to that event; and though it is enlarged and perfected, and discharged from a burden, on the death of the tenant for life, it does not then originate, nor derive its character from the law then in force.

But even if the vesting of the estate were suspended, until the happening of any event, when the event does happen, the right by descent must depend upon the law, as it stood when the descent was cast. Suppose an estate was granted sixty years ago, upon a condition subsequent, and the grantee died the year following; and now the event happens upon which the estate, by force of the condition, is defeated, and the heirs of the grantor become entitled to enter; and the question is, who are his heirs? Would it not be those who were the heirs of the donor at the time of his decease, sixty years ago? The benefit of the condition, the *scintilla juris*, then vested in them, viz., the right to enter for condition broken; and whether the condition were broken before or after the change of the law, the same persons would be heirs, constituted so by law, taking in the proportions fixed by that law when they became heirs.¹⁸

¹⁶ Allen v. Anderson, 44 Ind. 325.

¹⁸ Miller v. Miller, 10 Met. (Mass.)

¹⁷ Wood v. Griffin, 46 N. H. 239; 393.
Livingston v. Hayward, 11 Johns.
(N. Y.) 429.

§ 256. **Sale of reversionary interest.**¹⁹ Immediately connected with this subject is the sale by an heir or reversioner of his expectancy or reversionary interest. It is said that "it is incumbent upon those who deal with an expectant heir, relative to his reversionary interest, to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. In all such cases the issue is upon the adequacy of the price. No proof of fraud is necessary; and the relief is given upon general principles of mischief to the public, without requiring particular evidence of actual imposition." Such a purchase is a constructive fraud, and the purchaser, if a stranger, will be compelled to account and to give up the bargain, if found to be advantageous. A sale by an heir will not be supported against him unless it is perfectly fair in every respect, and beyond suspicion, and for an adequate price. The burden is upon the purchaser to show the fairness of the transaction and the sufficiency of the consideration, and not upon the heir to impeach either the one or the other; and it is said that it is immaterial that the heir is of mature age. In this country the rule may be stated with still more severity, that the sale, by an heir, of his expectancy during the life of the ancestor, is contrary to public policy and is void, unless such sale is assented to by the ancestor, and supported by an adequate consideration. If, however, the sale is at auction, it will be some proof of fairness and sufficiency of price, and if the sale is made with the knowledge and assent of the ancestor it will be good. But it seems that the rule is confined to those expectancies that combine the relation of heir with that of remainderman and reversioner. If the expectant is not heir, but is simply entitled to a remainder or reversion by virtue of some instrument or settlement, he may sell and assign his future interest, and such sale will not be avoided unless some of the common rules of equity are violated by the purchaser. In such cases there is no fraud upon parents or third persons, consequently there is nothing contrary to public policy in such purchases.¹⁹ The case last cited is not sustained by

¹⁹ 1 Perry on Trusts, citing *inter alia*, *Nimmo v. Davis*, 7 Tex. 260; *Poor v. Jenkins*, 12 Pet. 258; *v. Hazelton*, 15 N. H. 564; *David-*

other authorities and seems not to rest upon the principles applicable to such transactions.

In the language of Sir William Grant in *Gowland v. De Faria*, 17 Ves. 23, it will be laid down that "this is the case of a person who, in this court, is considered as an expectant heir;" and "that it is incumbent upon those who have dealt with an expectant heir, relative to his reversionary interest, to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. In all such cases, the issue is upon the adequacy of price; no proof of fraud is necessary, and the relief is given upon general principles of mischief to the public, without requiring particular evidence of actual imposition."²⁰

As some doubts are suggested by Mr. Justice Story and by Mr. Jeremy, in the passages cited of their treatises, whether the strictness of the doctrine applies to cases of dealings for remainders, it is deemed necessary to go into a slight review of the leading adjudged cases, to see if any conveyance resembling the present has been permitted to stand.

It is but justice, however, to say that I do not suppose either of those highly respectable authors intended to question the doctrine in a case like the present, where the estate in reversion descended upon an infant heir, encumbered with a life interest, and the expectancy was given to the tenant for life, within eighteen months after the heir became of age. That such purchase is a constructive fraud, and the purchaser, if a stranger, compelled to account and give up his bargain, if found to be advantageous, has not, for a century, been an open question. The conveyance is treated as a mortgage, and the grantor relieved on payment of the principal advanced and interest, without inquiry whether there was fraud or imposition.²¹

son v. Little, 22 Pa. St. 252; Boynton v. Hubbard, 7 Mass. 112; Fitch v. Fitch, 8 Pick. (Mass.) 480; Varick v. Edwards, 1 Hoff. (N. Y.) 383; Needles v. Needles, 7 Ohio St. 432.

²⁰ 2 Atk. 28; Jeremy's Eq. 398; 1 Story's Eq. 330, sec. 338; 1 Fonblanque's Eq. bk. 1, chap. 2, sec. 12;

1 Madd. Ch. 118, state the result of the adjudications.

²¹ The doctrine, during the seventeenth century, met with some opposition, especially in the reigns of Car. II, and Jac. II; but in *Nott v. Hill*, 1 Vern, 169; 1 P. W. 310; *Newland on Contracts*, 436, and

§ 257. **Incumbrance of reversions.** Does the law authorize the holder of a mechanic's lien to pass over, and leave wholly unmolested and untouched, the estate of the lessee, which

Bemey v. Pitt, 2 Vern. 14, it received the most conclusive confirmation short of the judgment of the House of Lords. In the former case, Lord Ch. Nottingham decreed redemption (in his own phrase); on rehearing. Lord Keeper North reversed this decree, and refused relief; but this last decree was again reheard before Lord Ch. Jeffries (2 Vern. 27), and reversed, and that of Lord Nottingham confirmed. So, in *Bemey v. Pitt*, the report of which is found in 2 Vern. 14; 1 P. W. 311; *Newland Con.* 347; Lord Nottingham denied relief; but Lord Ch. Jeffries (2 Jac. 2), on rehearing, reversed the decree, and let in the grantor to redeem on the usual terms of paying the money advanced with interest.

In the case of *Twisleton v. Griffith*, 1716, the exception was again invoked that there was no fraud in fact; it was urged that at this rate the heir of the remainder could not sell, as no one would buy, to which Lord Cowper replied: "This might force an heir to go home and submit to his father, or bite on the bridle and endure some hardships; and in the meantime he might grow wiser and be reclaimed." (1 P. W. 313.)

In *Peacock v. Evans*, 16 Ves. 514, the Master of the Rolls says, when speaking of an heir selling the expectancy of a remainder during his father's life: "To that class of persons this court seems to have extended a degree of protection approaching nearly to an incapacity to bind themselves by con-

tract;" and he cites with approbation the expressions of Lord Ch. Eldon, in *Coles v. Trecothick*, 9 Ves. 234, that "the cases of reversions and interests of that sort go upon a very different principle; in some the whole duty of making good the bargain, upon the principles of this court, is upon the vendee, as in the instance of heirs expectant." And Sir William Grant added: "The tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, seems not to have been considered as operating to prevent its adoption and establishment; but, on the contrary, some of the judges have avowed that probable consequence as being to them the recommendation of the doctrine."

In the case referred to, it was admitted there was nothing approaching to fraud or imposition, yet the conveyance was set aside, because a full price had not been paid. All that could be said of it was that Mr. Peacock had obtained a very advantageous bargain.

So, in *Gowland v. DeFaria*, 17 Ves. 23, where reversionary interest had been sold, in which the plaintiff's mother had a life estate, all fraud was denied, and no proof introduced save that the consideration was not full; and in reply to the argument of manifest fairness, the Master of the Rolls replied; "In all these cases the issue is on the inadequacy of price. This is the case of a person who, in this court, is considered as an expect-

may be for a long term of years, or that of a tenant by the curtesy, for example, which is for life, and at his mere will and choice to throw the whole burden of expensive improvements upon the reversioner, and enforce the claim by a sale of the reversion? If so, it is easy to see that the position of landowners who have given what are called building leases, may be subject to great embarrassment. It may be that the right of the reversioner is very remote, and he may be wholly unable to regulate or prevent the operations of the intermediate tenant. He may have a mere contingent remainder, in which the rights of persons not yet in being are implicated. But we do not understand that the law gives to the holder of the lien any such arbitrary and unreasonable option.²⁰

§ 258. Reversions in lands held by corporations. Charter recitals may limit the duration of a corporation to a specified number of years, and yet the company is at liberty to purchase and hold a fee, and to dispose of any realty at pleasure. On the dissolution of the corporation the grantor of any real estate previously sold to it will be debarred of any reversionary interest by an alienation in fee made by the corporate officials before the expiration of the charter limit. And this rule is founded upon the most obvious principles of justice. The grantor having received full consideration for his conveyance, and having intended to part with all of his interest, both legal and equitable, in the estate conveyed, should not be allowed to receive a donative in the shape of a reversion, and hence the device is resorted to of an alienation of the property in fee in order to defeat his claim. I hazard the suggestion that even in the absence of a conveyance by the corporation before its legal dissolution, the principle of estoppel might be successfully invoked to prevent the intrusion of any claim whatever on the part of the grantor. Cer-

ant heir. He has charged his reversionary interest, and the question is whether he has received an adequate consideration. Upon that question the evidence is all one way," and the conveyance was

treated as a mortgage. (*Vide, Davis v. The Duke of Marlborough*, 2 Swanston, 147.)

²⁰ *Francis and others v. Sayles*, 101 Mass. 435.

tainly equity would regard the real estate of the corporation after its dissolution as valuable assets belonging to the stockholders. A recent New York decision has held that where premises were conveyed for the uses and purposes of a railway, and for no other purpose, there was still nothing to prevent a valid alienation by the grantee, although the condition subsequent might raise the possibility of a reverter.²¹ In this case, however, the company took the estate subject to a condition. Had it received an absolute fee in the first instance, it may be doubted if any reversion could be claimed by the grantor.²²

²¹ Buffalo Pipe Line Co. v. R. R. Co. 10 Abb. (N. C.) 107.

²² See Nicoll v. N. Y. & E. R. R. Co. 2 Kern. (12 N. Y.) 129.

CHAPTER XVI.

POWERS.

SEC. 259. Powers of attorney.

260. Construction of powers.

Introductory note. After a most extended and laborious investigation and comparison of the statute law of the various States, relating to the subject of powers, the conclusion is irresistible that the codification effected by the recent enactments of the New York Legislature is by far the most valuable exposition of the topic ever spread upon the statute books of any jurisdiction. Upon critical review it will be readily admitted that they embody not only the substantive law relating to the discussion, but also many efficient practice regulations that under the modern procedure are quite generally regarded as tributary to this discussion. In brief they are clear, crisp, and epigrammatic utterances by which indisputably appear, without tautology or senseless verbiage, the ultimate essence of the law that now controls all phases of the subject. Article IV of chapter 46, of the Laws of 1896, displays itself in fifty-two subdivisions, where with rare skill the very eminent revisers have stated the law with unrivaled felicity and brevity. The article is here reproduced under the conviction that no text writer is likely to improve upon that which has engrossed the exclusive attention of some of the ablest jurists in this or any other land. Those who are in a position to recall the painful elaborations of Mr. Sugden — elaborations that drone through interminable reams of paper merely for the purpose of exposing some particular “whim-wham” of the English practice that is of no moment here — will the more appreciate the obvious merits of this exceedingly creditable piece of legislation.

By the previous revision of 1830, a series of enactments were passed by the New York Legislature, the design of which was to abolish all powers previously known as operat-

ing under the Statute of Uses and the Statute of Wills, and for nearly seventy years the enactments designed to replace the laws previously in vogue have been under constant judicial construction. The result has been highly satisfactory, and the codification of 1896 supplies deficiencies, modifies previous rulings, enlarges the scope of some sections, and creates a general re-vamping of the subject as administered by the courts in that State. I append the full text of this very admirable performance in the hope that it will stimulate a sentiment toward uniformity in this important branch of our jurisprudence.¹

POWERS.

- Section 111. Definition of a power.
- 112. Definitions of grantor, grantee.
 - 113. Division of powers.
 - 114. General power.
 - 115. Special power.
 - 116. Beneficial power.
 - 117. General power in trust.
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 - 119. Capacity to grant a power.
 - 120. How power may be granted.
 - 121. Capacity to take and execute a power.
 - 122. Capacity of married woman to take power.
 - 123. Capacity to take a special and beneficial power.
 - 124. Reservation of a power.
 - 125. Effect of power to revoke.
 - 126. Power to sell in a mortgage.
 - 127. When power is a lien.
 - 128. When power is irrevocable.
 - 129. When estate for life or years is changed into a fee.
 - 130. Certain powers to create a fee.
 - 131. When grantee of power has absolute fee.
 - 132. Effect of power to devise in certain cases.
 - 133. When power of disposition absolute.
 - 134. Power subject to condition.

¹ On the subject of the Revision of 1830 see *Hotchkiss v. Elting*, 36 Barb. (N. Y.) 38.

- Section 135. Power of life tenant to make leases.
136. Effect of mortgage by grantee.
137. When a trust power is imperative.
138. Distribution when more than one beneficiary.
139. Beneficial power subject to creditors.
140. Execution of power on death of trustee.
141. When power devolves on court.
142. When creditors may compel execution of trust power.
143. Defective execution of trust power.
144. Effect of insolvent assignment.
145. How power must be executed.
146. Executed by survivors.
147. Execution of power to dispose by devise.
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149. When direction by grantor does not render power void.
150. When directions by grantor need not be followed.
151. Nominal conditions may be disregarded.
152. Intent of grantor to be observed.
153. Consent of grantor or third person to execution of power.
154. When all must consent.
155. Omission to recite power.
156. When devise operates as an execution of the power.
157. Disposition not void because too extensive.
158. Computation of term of suspension.
159. Capacity to take under a power.
160. Purchaser under defective execution.
161. Instrument affected by fraud.

§ 111. Definition of a power.—A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power might himself lawfully perform.

§ 112. Definition of grantor, grantee.—The word “grantor” is used in this article, in connection with a power, as designating the person by whom the power is created, whether by

grant or by devise; and the word "grantee" is so used as designating the person in whom the power is vested, whether by grant, devise or reservation.

§ 113. Division of powers.— A power, as authorized in this article, is either general or special, and either beneficial or in trust.

§ 114. General power.— A power is general, when it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever.

§ 115. Special power.— A power is special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or,

2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.

§ 116. Beneficial power.— A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

§ 117. General power in trust.— A general power is in trust, where any person, or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

§ 118. Special power in trust.— A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or,

2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

§ 119. Capacity to grant a power.— A person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates.

§ 120. How power may be granted.— A power may be granted either:

1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates; or,

2. By a devise contained in a will.

§ 121. Capacity to take and execute a power.— A power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property.

§ 122. Capacity of married woman to take power.— A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.

§ 123. Capacity to take a special and beneficial power.— A special and beneficial power may be granted,

1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

2. To a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; and such a power is valid to authorize a lease for that period but is void as to the excess.

§ 124. Reservation of a power.— The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and a power thus reserved, shall be subject to the provisions of this article, in the same manner as if granted to another.

§ 125. Effect of power to revoke.— Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

§ 126. Power to sell in a mortgage.— Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

§ 127. When power is a lien.— A power is a lien or charge on the real property which it embraces, as against creditors, purchasers and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect.

§ 128. When power is irrevocable.— A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.

§ 129. When estate for life or years is changed into a fee.— Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

§ 130. Certain powers create a fee.— Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers.

§ 131. When grantee of power has absolute fee.— Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

§ 132. Effect of power to devise in certain cases.— Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

§ 133. When power of disposition absolute. Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

§ 134. Power subject to condition.— A general and beneficial power may be created subject to a condition precedent

or subsequent, and until the power becomes absolutely vested it is not subject to any provision of the last four sections.

§ 135. Power of life tenant to make leases.— The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished.

§ 136. Effect of mortgage by grantee.— A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are:

1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and,
2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein.

§ 137. When a trust power is imperative.— A trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.

§ 138. Distribution when more than one beneficiary.— Where a disposition under a power is directed to be made to, among, or between, two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.

§ 139. Beneficial power subject to creditors.— A special and beneficial power is liable to the claims of creditors in the

same manner as other interests that can not be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.

§ 140. Execution of power on death of trustee.— If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust.

§ 141. When power devolves on court.— Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the supreme court.

§ 142. When creditors may compel execution of trust power.— The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.

§ 143. Defective execution of trust power.— Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.

§ 144. Effect of insolvent assignment.— A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors.

§ 145. How power must be executed.— A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner.

§ 146. Execution by survivors.— Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors.

§ 147. Execution of power to dispose by devise.— Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law.

§ 148. Execution of power to dispose by grant.— Where a power is confined to a disposition by grant, it can not be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power.

§ 149. When direction by grantor does not render power void.— Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the provisions of this article.

§ 150. When directions by grantor need not be followed.— Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power.

§ 151. Nominal conditions may be disregarded.— Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

§ 152. Intent of grantor to be observed.— Except as provided in this article, the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the supreme court, to supply a defective execution as provided in this article.

§ 153. Consent of grantor or third person to execution of power.— Where the consent of the grantor or a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or in a written certificate thereon. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded.

§ 154. When all must consent.— Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto; but if, before its execution, one or more of them die, the consent of the survivor or survivors is

sufficient, unless otherwise prescribed by the terms of the power.

§ 155. Omission to recite power.— An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create, except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein.

§ 156. When devise operates as an execution of the power.— Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication.

§ 157. Disposition not void because too extensive.— A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid.

§ 158. Computation of term of suspension.— The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power must be computed, not from the date of such instrument, but from the time of the creation of the power.

§ 159. Capacity to take under a power.— An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.

§ 160. Purchase under defective execution.— A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner.

§ 161. Instrument affected by fraud.— An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee.

The following is a partial list of the various reports of the State of New York referred to in the citations,—

but not arranged chronologically. It may be pertinent to remark, in this connection, that Barbour, Lansing, Hun, Howard and Abbott represent the intermediary or subordinate court decisions of the State, while Johnson, Hopkins, Paige, Edwards, Hoffman, Clarke, and Sanford are the titles that designate the thirty-two volumes of the Chancery Reports starting with Chancellor Kent in 1829. The early numbers of the present Court of Appeals Reports are sometimes referred to under the reportorial name of Comstock, Selden, Kernan, Tiffany and Sickles, while the reports of Johnson, Cowan, Wendell, Hill, and Denio, must also be understood as earlier reports of the same State.

§ 259. Powers of attorney. Powers of attorney, or letters of attorney as they are sometimes called, simply authorize some one to act as agent or attorney for another. The subject is more closely related to discussions on agency, but, as such powers frequently confer a right to convey realty, it may be appropriate to observe that where such is the case the power should be conferred with all the solemnities that surround the deed the attorney or agent is expected to execute. These powers of attorney differ from those which derive their attributes from the doctrine of uses. They generally are resorted to to expedite business and perform certain specified acts for absentees. They should be under seal for many purposes, but not all.² If, however, the appointee is to execute a conveyance, the power should be under seal.³ By statute in most of the States, such a power to convey real estate should be executed, acknowledged, and duly recorded.⁴ The mere authorization to make a contract for the future conveyance of land need not be under seal, nor even in writing.⁵ Our principle concern, however, is with those powers that directly involve the doctrine of uses.

§ 260. Construction of powers. There is nothing so sacramental about a power as to entitle it to any special indulgence from the courts in the matter of construction. And

² Watson v. Sherman, 84 Ill. 263.

³ Rowe v. Ware, 30 Ga. 278; Smith v. Dickinson, 6 Humph. 261.

⁴ Stimson's Amer. St. sec. 1670.

⁵ Rottman v. Wasson, 5 Kan. 552; Lawrence v. Taylor, 5 Hill, 113.

in all instances, the struggle is, as we have stated, to effectuate the intent of the donor, and in determining the scope and nature of this intent the construction will proceed in the light of the surrounding circumstances, always keeping in view the purpose to be accomplished. Mere naked powers are said to be strictly construed.⁶ But in most cases there is a disposition to relax the rules of strict construction, and proceed by common sense methods that will override fanciful impediments and reach a result comporting with a rational view of the ends aimed at.⁸ It frequently happens that in the effort to accomplish the donor's intent some minor design is frustrated. But in all cases the effort is to give full effect to the general intention, wherever it can be done without ignoring some settled rule of law, or contravening some rule of public policy.⁷ The extent of the power is to be settled by the language employed, "aided by the situation of the parties and of the property, the usages of the country, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question."⁹ This is the language of Mr. Justice Woodbury of the first circuit. Generally it may be said that in the construction of the instrument creating the power the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. And where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. The judge should be placed in the position of those whose language he is to interpret. Terms are to be construed in their general acceptation, and written words will control those printed in blank from.¹⁰ Another rule of construction requires the language of a writing to be interpreted according to the meaning it bears in the place of its execution unless the parties have reference to a different place.¹⁰

⁶ Kerr v. Verner, 66 Pa. St. 326;
Collins v. Foley, 63 Md. 156.

⁷ Wilson v. Troup, 7 Johns. Ch.

⁸ Leroy v. Beard, 49 U. S. 466.

⁹ 2 Rice's Ev. 1350.

¹⁰ Id.

Of course, every document whatever must, to some extent, be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and, therefore, in every case whatever, every fact must be allowed to be proved to which the document does, or probably may refer.¹¹

¹¹ Steph. Dig. note 33; 1 Rice on Ev. 251.

CHAPTER XVII.

EXECUTORY DEVICES.

- SEC. 261. The term defined.
262. Origin and history.
 a. Note from Chancellor Kent.
 b. From Professor Walker.
263. Two kinds of executory devises.
264. Distinction between executory devises and vested remainders.
265. Not favored by our courts.
266. Their tendency is to create a perpetuity.
267. Construction and interpretation.
268. The construction of wills.
269. The phrase "dying without issue" explained.

§ 261. **The term defined.** An executory devise is in a general sense — a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency.¹ A disposition of lands by will, by which no estate vests at the death of the devisor, but only on some future contingency.²

In a stricter sense, a limitation by will of a future contingent interest in lands, contrary to the rules of the common law.³ A limitation by will, of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder.⁴

It is the substitution of another estate on the happening of an event cutting off the prior estate. The term has been used also to denote a proviso determining an estate, without itself substituting another; the best treatises apply the term to the former case only.⁵ A condition ends the es-

¹ 1 Fearn on Remainders, 382.

² 2 Bl. Com. 172.

³ 4 Kent's Com. 263; 1 Steph. Com.

564.

⁴ 2 Powell on Dev. (by Jarman), Alienation, p. 12, note.

237; Lewis on Perpetuity, 71, 72; 1 Burrill's Law Dict. tit. "Executory Devise."

⁵ See Gray on Restraints on

tate without limitation over—that is, only the heir can enforce it.⁶

“Executory devises are not naked possibilities, but are in the nature of contingent remainders; and there is no doubt but that such estates are transmissible, and consequently devisable.”

The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for, a preceding estate in fee simple, is an executory devise.⁷

Whenever, therefore, a devisor disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise.⁸

Many of the subjects connected with this particular form of expectancy are among the most abstruse and profound of all the questions brought before courts of justice upon this most difficult branch of the law of real property; they depend upon considerations and distinctions highly technical, artificial and refined, and to render the subject more perplexing, there is found, upon some points, a most distressing diversity of opinion among eminent jurists, who are regarded as the highest authorities upon most questions of law.⁹

⁶ Walker's Amer. Law, p. 360, note a.

⁷ 4 Kent's Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise's Dig. tit. 38, chap. 17, secs. 1, 2; Purefoy v. Rogers, 2 Saund. 388a and note.

⁸ 4 Kent's Com. 268; 6 Cruise's Dig. 38, chap. 17, sec. 2; Bac. Ab. Devise, 1; 1 Fearn's Cont. Rem. 399.

⁹ Mr. Perry says: Executory devises are a species of testamentary

dispositions, allowed by courts of law, and when properly exercised, they pass the legal estate or interest to all persons in favor of whom the dispositions are made. They are devises to take effect at a certain time in the future, or upon a certain event, and in favor of certain persons. Limitations by way of springing or shifting uses are similar in effect, except that they are created by deeds *inter vivos*, and are

While it is substantially true that an executory devise is in substance a remainder created by will, and is distinguished by many of the characteristics that we recognize in a remainder, it is still true that there are peculiarities of construction that appear only in this form of expectancy, and we shall endeavor in this section to bring them into prominence. It may be regarded as settled beyond the reach of controversy that a future interest in lands will be held to take effect as a remainder, and not as an executory devise.¹⁰ And another distinction is that through the medium of an executory devise a term of years may be limited over after a life interest created in the same.¹¹ Again, it is familiar law that a remainder must have a particular estate to support it, while an executory devise is not dependent upon anything of the sort. A remainder is always favored, and it is only where the testamentary intent cannot in any way be accomplished except by way of executory devise, that this particular form of estate is recognized.¹² One obvious advantage is enjoyed by this species of estate; as they are in no way dependent upon a prior estate they cannot be affected, much less defeated by any act of the holder of the particular estate. Unless

based upon the Statute of Uses. Whenever the event happens when a shifting or springing use is to take effect, the Statute of Uses vests the legal seizin and ownership in the person entitled by virtue of the use. These executory devises, and shifting and springing uses, must vest in the persons intended to be benefited within the time allowed by law, or they will be declared illegal and of no effect. The same rules apply in equity to trusts. In cases of trusts the legal estate is vested in certain trustees and their heirs; but the beneficial interest, or equitable estate, is given by the grantor, testator, or settler to such person or persons, and upon such terms and upon such events, as he shall declare. The settler can change and shift the beneficial en-

joyment of the equitable estate from one person to another, in the future, in a manner analogous to the limitations of springing or shifting uses under the Statute of Uses. Courts of equity always take special care that future estates or interests shall not be destroyed by the present user of the property; and that the limitations of future equitable interests shall not transcend the limits assigned for the limitation of similar legal interests or executory devises, and shifting and springing uses at law. (1 Perry on Trusts, 485.)

¹⁰ *Manderson v. Lukens*, 23 Pa. St. 31; *Wolfe v. Van Nastrand*, 2 N. Y. 436.

¹¹ *Hill v. Hill*, 74 Pa. St. 173.

¹² *Doe v. Considine*, 6 Wall. 445.

by some recital in the will an act of that character will operate in its destruction.¹³ The tendency of legislation in this country is to provide appropriate statutes by which the courts are at liberty to avail themselves of any indication that may appear in the case by which they can hold that a failure of issue, when made the contingency or event upon which a second limitation was to vest, means a failure upon the death of the first taker — the owner of the particular estate. A definite failure of issue is always preferred to an indefinite. The principle decided by the celebrated case of *Pells v. Brown*, Cor. Jac. 590 (a decision that may be regarded as imparting the breath of life to all executory devises), proceeds upon this theory. A devise to A. and his heirs, and if he die, without living issue, then to B. The devise was held to refer to a failure of issue during the life of B. The phrase so frequently met with, "leaving no issue, or dying without issue," is construed to mean a definite failure of issue.¹⁴ An apt illustration of an executory devise occurs in *Brightman v. Brightman*, 100 Mass. 238. Israel Brightman's will, devising certain real estate "to Daniel and John Brightman and to their heirs and assigns," taken by itself, gave them an estate in fee simple. The subsequent clause providing that "if the said Daniel or John shall decease, leaving no issue of his body lawfully begotten, then what I have devised to such one, I here devise to the survivor thereof and his heirs and assigns," created an executory devise limited upon that fee simple.¹⁵ But the contingency did not happen; for Daniel died first, and left issue; and when John died Daniel did not survive him. Upon the decease of Daniel leaving issue, the contingency mentioned became impossible, and the estate in fee simple remained.

The controlling reason influencing courts in their preference for contingent remainders rather than for executory devises is doubtless due to the fact that estates limited by this latter form of expectancy are indestructible, and do not come under any immediate prospect of free alienation. It

¹³ *Proprietors v. Grant*, 3 Gray 303; also *Hill v. Hill*, 74 Pa. St. (Mass.), 146. 173.

¹⁴ See the remarks of Judge Ralpho in *Manice v. Manice*, 43 N. Y. 56. ¹⁵ *Richardson v. Noyes*, 2 Mass.

has been the universal policy of our laws to so regulate the devolution of real property, as to give it the attributes of a commodity easily and frequently transferred. And hence, we find an almost morbid excess of decision to the effect that wherever a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed as an executory devise, but shall be regarded as a contingent remainder.¹⁶ Indeed, it may be said, that the rules of construction are inflexible. "A future limitation must be regarded as a remainder, unless the language imperatively requires its recognition as an executory devise." This declaration is clearly deducible from the great Duke of Norfolk's case which, with the earlier case of *Pells v. Brown*, fully sustains the contention that regards the future limitation as an executory devise whenever the language of the testator leaves no room for doubt as to his intention.

§ 262. **Origin and history.** Writers of extreme inquisitiveness, who have a mania for probing into the source of things, tell us that prior to the case of *Pells v. Brown*, Cro. Jac. 590, executory devises had a beginning, and although of rare occurrence, the principle they represent was by no means unfamiliar. Be this as it may, certain it is that until the case last cited — which was decided by the Court of King's Bench in 1619 — no authentic record exists in the English law reports of an analogous decision. For all practical purposes *Pells v. Brown* originated the modern doctrine of executory devises. The English courts, after the passage of the celebrated Statute of Wills (32 Hen. VIII), in their determined effort to support the intention of the testator followed the analogies furnished in conveyances to uses. And it was an all but inevitable result that they should gradually regard with favor the validity of a limitation not recognized by the common law system of conveyance. To this remorseless determination to sustain at all hazards the testamentary intention is to be traced the origin of that species of property limitations known as executory devises, or the doctrine that a fee may be limited after a fee by the recitals of the last

¹⁶ *Nightingale v. Burrill*, 15 Pick. (Mass.) 104.

will and testament. *Pells v. Brown* placed this doctrine beyond the reach of controversy or argument or even demur. Lord Kenyon says in *Porter v. Bradley*, 3 Term Rep. 145, that "the case is now regarded as the foundation, and as it were, the *magna charta* of this branch of the law." For nearly three centuries it has stood as the authoritative utterance of the proposition that an executory devise limiting a fee after a fee upon some contingency which operates to defeat the estate of the first taker, otherwise known as the particular estate, is valid, and should be recognized as a common form of assurance.

The old common law doctrine of repugnancy between the two estates might have been sustained as rational, if we are willing to assume enough in its favor. But it has been utterly annihilated by the unanswerable logic sustaining the contention that the prior gift (the estate of the first taker), although created by words which, standing alone, might import an absolute estate, yet as restrained by the subsequent limitation clearly imply an intention to confer only a qualified interest or estate. It is true that the particular or prior estate is denominated a fee — because it may last forever — but it is none the less a base or determinable fee because it is constantly menaced with overwhelming defeat whenever the contingency upon which it is limited happens, and this contingency is never under the volition and control of the first taker. Under the judicial construction the limitation prevents the vesting of a fee absolute in the first taker, and gives him only a qualified or determinable fee.

While the books fairly teem with learning on this subject, the case of *Jackson v. Bull*, 10 Johns. Rep. 19, and *Ide v. Ide*, 5 Mass. 500, are among the earliest decisions in this country which illustrate the principles upon which the doctrine of executory devises rests. In the first case cited, Judge Kent, afterwards Chancellor, wrote the opinion, and it has been a source of contention in the courts from that day to this, although quite generally sustained.¹⁷

¹⁷ a. *Note from Chancellor Kent.* — The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold that policy, and keep property free

§ 263. **Two kinds of executory devices.** We can evade a great deal of confusion by clearly apprehending the exact difference between the two kinds of executory devices, and

from the fetters of entailments, under whatever modification or form they might assume. Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property. "The reluctant spirit of English liberty," said Lord Northington, "would not submit to the statute of entails; and Westminster Hall, siding with liberty, found means to evade it." Common recoveries were introduced to bar estates tail; and then, on the other hand, provisos and conditions not to alien with a cessor of the estate or any such attempt by the tenant, were introduced to recall perpetuities. The courts of law would not allow any such restraints by condition, upon the power of alienation, to be valid. "Such perpetuities," said Lord Bacon, "would bring in the use of the former inconveniences attached to entail;" and he suggested that it was better for the sovereign and the subject that men should be "in hazard of having their houses undone by unthrifty posterity, than be tied to the stake by such perpetuities."

Executory limitations were next resorted to, that men might attain the same object. Mr. Hargrave has gleaned from the oldest authorities a few imperfect samples of an executory devise; but this species of

limitation may be considered as having arisen since the Statute of Uses and of Wills. It was slowly and cautiously admitted, prior to the leading case of *Pells v. Brown*. Springing uses of the inheritance furnished a precedent for similar limitations in the form of executory devices; and it was decided in *Pells v. Brown* that a fee might be limited upon a fee by way of executory devise, and that such a limitation could not be barred by a common recovery. (4 Kent's Com. 297.)

b. *From Prof. Walker.*—Executory devices. Remainders created by will differ so much from remainders created by deed, that they have taken the distinct name of executory devices. These differences are to be ascribed to that indulgence which the law on all occasions shows to testators, by giving effect to their intentions, however untechnically expressed. A statement of them will justify what has been said respecting the arbitrary character of the law of remainders, strictly so called. 1. No particular estate is necessary to precede an executory devise, since by will a freehold might always be made to commence at a future time. Thus, if I devise to you an estate in fee, to commence six months after my death, this is a good executory devise. 2. The limitation of an estate, by will, after an estate in fee-simple, is said to be a good executory devise. For example, if I devise land to you and your heirs forever, but if you die within age, then to your brother and his heirs,

the legal incidents that characterize each particular kind. Suppose an estate is devised to one, but on the happening of some future event that estate is determined — altogether ceases as to the first devisee, and goes over to an altogether different person. These are the characteristics of the first class. Secondly, we will assume that an estate is limited to commence at some future time. Now such estates, it will be remembered, are in direct contravention of the rules of the common law. Until the time arrives for the commencement of the estate the fee of the property is in the heir of the deviser. These constitute the material characteristics of the

the limitation to your brother and his heirs is good by way of executory devise, although the first estate was a fee-simple. (I take this rule and illustration as I find them in the books. But it seems to me that, after a fee-simple, nothing remains; and that the example here given is one of a fee conditional. See *Taylor v. Foster*, 17 Ohio St. 166; *Niles v. Gray*, 12 Id. 320; *Lapham v. Martin*, 33 Id. 99; *Ratliff v. Warner*, 32 id. 334.) 3. Remainders created by deed are defeated by the failure of the particular estate. But this is not the case with executory devises, which cannot be affected by any subsequent alteration of the estates upon which they are limited. (*Thompson v. Hoop*, 6 Ohio St. 480; *Holt v. Lamb*, 17 Id. 374.) Such is the liberal spirit of the law of executory devises in these three important particulars. For the purpose of effectuating the will of the testator, the law rises above the technical doctrines of remainders, and follows the dictates of reason. Yet it seems to do so with great reluctance; for the rule is, that no limitation by will shall be construed as an executory devise when it can be treated as a contingent remain-

der. And, accordingly, whenever there is a preceding estate, capable of supporting a contingent remainder, the next estate limited by devise is construed to be a remainder, and as such is liable to all the incidents of contingent remainders. (*Thompson v. Hoop*, 6 Ohio St. 480.) Executory devises are expressly within the statutory provision before mentioned, restricting the limitation of estates to persons in being and their issue; and they are within the policy of the law which requires the event upon which they are limited to be a common and not a remote possibility. (*Walker's Am. Law*, 340.)

See the case of the *Church in Brattle Square v. Grant*, 3 Gray, 142, where it was declared to be the settled rule in England that all limitations by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterwards, as a term in gross, or in case of a child *en ventre sa mere* twenty-one years and nine months, are void as too remote, and tending to create perpetuities. (*Walker's Am. Law*, 341.)

second kind of executory devises. Recapitulating, it appears that estates of the first kind vest immediately, but cease and determine upon the happening of some future event. While estates in the second class do not commence until some future time. But when they do commence they are liable to last forever.¹⁸

§ 264. **Distinction between executory devises and vested remainders.** The first is such a disposition of lands by will, that thereby no estate vests at the devisor's death, but only on some future contingency. It needs no particular estate to support it. An estate in remainder is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole.¹⁹ In the case first cited, Chancellor Kent says: "We may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee."²⁰

"The essential difference in the quality of the estate, between a remainder and an executory devise is, that the former may be barred at the pleasure of the tenant in tail, by a common recovery, or, in some States, by a conveyance by deed; but he who holds by force of an executory devise, has an estate above and beyond the power and control of the first taker, who cannot alienate or change it, or prevent its taking effect, according to the terms of the will, upon the happening of the contingency upon which it is limited. It does not depend upon the particular estate, but operates by way of determination of the first estate limited, and the substitution of another in its place."²¹

¹⁸ *Nightingale v. Burrell*, 15 Pick. (Mass.) 104.

²⁰ *Doe v. Considine*, 6 Wall. 474.

¹⁹ *Jackson v. Robbins*, 16 Johns. (N.Y.) 537; *Downing v. Wherrin*, 19 N. H. 9, 85.

²¹ *Nightingale v. Burrell*, 15 Pick. (Mass.) 104.

§ 265. **Not favored by our courts.** Authorities are not wanting that have directly held, whenever possible, that courts will declare a future interest in land as falling under the rules applicable to contingent remainders, rather than under rules governing an executory devise.²² And it is a regrettable circumstance that the technical distinction between contingent remainders, springing or secondary uses, and executory devises, cannot be entirely abolished — as they are admirably calculated to mislead and perplex a topic naturally invested with much obscurity. The rules applicable to the subject are exceedingly nice and technical. They are not favored in law, and were originally created and upheld only for the purpose of carrying out the intention of testators, so that devises should not fail of effect, which, consistently with rules of law, could not take effect as remainders.²³ Therefore it is an established rule that when an estate is limited to take effect after an estate tail, the future or contingent interest so limited, constitutes an estate in remainder, and does not take effect as an executory devise. The estate tail being a particular estate carved out of the fee, leaves the residue to take effect, after the determination of the particular estate, as a remainder.

§ 266. **Their tendency is to create a perpetuity.** Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise.²⁴ Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this country, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator,

²² *Manderson v. Lukens*, 23 Pa. St. 31; *Wolfe v. Van Nostrand*, 2 Comst. 436; *St. Aurorer v. Rivard*, 2 Mich. 294.

²³ *Purefoy v. Rogers*, 2 Sund. 388;

Doe v. Morgan, 3 Tr. 765; 4 Kent's Com. 263; *Nightingale v. Burrell*, 15 Pick. 110.

²⁴ 4 Kent's Com. 266; 2 Saund. 388a, note.

and twenty-one years afterwards, as a term in gross, or, in case of a child *en ventre sa mère*, twenty-one years and nine months, are void as too remote, and tending to create perpetuities.²⁶

§ 267. **Construction and interpretation.** In various States of the Federal Union, the policy has been adopted of construing all devises in a way that will effectuate the manifest intent of the testator, provided this can be done without violence to some settled rule of law or requirement of public policy. The guiding star in all our courts is the intent of the devisor, and to achieve this result great latitude is indulged both as to evidentiary facts and common law regulations.

Lord Hardwicke, in *Minchell v. Minchell*, 1 Atkyns, 412, says: "A court never construes a devise void, unless it is so absolutely dark that they cannot find out the testator's meaning."²⁷

A devise to one and his heirs forever, and in case of his death without any heir, then to another, gives a fee to the first taker, and the devise over is void.²⁸

A devise to one and his heirs forever, and if he dies without heirs then to a stranger in blood to the devisee, gives the devisee an estate in fee and the devise over is void for remoteness.²⁹

A devise in fee subject to a conditional limitation void for remoteness vests an absolute estate in the first taker.³⁰

²⁶ 4 Kent's Com. 267, 1 Jarm. on Wills, 221; 4 Cruise's Dig. tit. 32, chap. 24, sec. 18; see for full discussion of "Perpetuities," sec. 270, *post*.

²⁸ *Banks v. Phelan*, 4 Barb. 90; *Parsons v. Parsons*, 1 Ves. Jr. 266, and authorities cited; *Mann v. Mann*, 14 Johns. (N. Y.) 5; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. Surr. 148; see also *Beaumont v. Fell*, 2 P. Wms. 140, where Gertrude Yardley was held entitled to a legacy given to Catherine Earnley; *Connelly v. Pardon*, 1 Paige, 292; *Gardner v. Heyer*, 2 Id.

11; *Smith v. Smith*, 4 Paige (N. Y.), 271; *Carter v. Bloodgood*, 3 Sandf. Ch. 393; *Terpening v. Skinner*, 29 N. Y. 505; *Trustees, etc. v. Colgrove*, 4 Hun, 362; *Hart v. Marks*, 4 Bradf. 161.

²⁷ *Tilbury v. Barbut*, 3 Atk. 617.

²⁸ *Ware v. Cann*, 10 Barn. & C. 433.

²⁹ *Brattle Square Church Proprs. v. Grant*, 3 Gray, 146, 63 Am. Dec. 725; *Miller v. Macomb*, 26 Wend. 229; *Ferris v. Gibson*, 4 Edw. Ch. 707, 6 L. ed. 1027; *Conklin v. Conklin*, 3 Sandf. Ch. 64, 7 L. ed. 771; *Ring v. Hardwick*, 2 Beav. 352;

§ 269. The phrase "dying without issue" explained.—Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death with-

Drummond v. Drummond, 26 N. J. Eq. 234; Smith v. Townsend, 32 Pa. 434.

But the law will allow a devise of lands in fee-simple to one, with an executory devise over to another on a contingency, which must happen within the compass of a life or lives in being, and twenty-one years and a few months after. The twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child. But if the devise over is limited after the devise of a part, and not of the whole of the fee-simple, the second devisee shall take by remainder, either vested or contingent, and not by executory devise.

As remainders are estates at common law, while executory devises can only be created by will, and are admitted from necessity, to execute the legal intent of the testator, it is an essential principle of law, in the construction of wills, to exclude executory devises, when the estate can pass as a remainder. (*Hawley v. Northampton*, 8 Tyng. 1.)

The technicalities that infest the law of executory devises as administered by the English courts for the last two hundred years have left many disagreeable impressions upon our own decisions, one of which is that the same word is liable to receive a different construction by a different court. The words "dying without issue," unless explained or qualified by other expressions, have acquired a dis-

tinct and well understood meaning, by a uniform series of decisions both in this country and in England. They are held to mean an indefinite failure of issue after the death of the first devisee. This rule of construction is founded on the presumed intent of the testator to include the issue of the first devisee as the objects of his bounty. This purpose is best secured by vesting an estate tail in the first devisee, so that his issue, upon his death, will take in succession, until the issue shall fail, when the remainder will take effect in possession from this rule of law, that if an estate is devised to A. and his heirs, which would create a fee-simple, and it is afterwards provided, either in the same clause, or by other parts of the will, that if A. die without issue, then the estate is to go to B., this cuts down the estate of A. to an estate tail by implication. The generality of the word "heirs" is restrained, by the subsequent proviso or contingency of dying without issue, to the issue of the first devisee. So that in such case A. would take an estate tail, with a remainder to B. on the determination of the first estate. The law implies, from the use of the word "heirs" in the first clause, in connection with the subsequent contingency of dying without issue, that it was meant to designate "heirs of the body," and that it was the intent of the testator to give the estate to the issue of the first devisee, and not to give it over until that issue failed. (4

out issue, it has, I think, been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue, in the life-time of the testator, and that the primary devisee surviving the testator takes an absolute estate in fee simple.³⁰ The case of *Quackenboss v. Kingsland* was that of a devise by the testator of the residue of the real and personal estate to "my son Daniel Kingsland, and to his heirs, but in case my son Daniel should '*die without lawful issue*,' I give and bequeath it to my remaining children, share and share alike;" and it was held, in exact conformity with the decisions to which we have referred, that the words referred to the death of the primary devisee in the life-time of the testator.

If real estate is devised upon condition to pay a legacy,

Kent's Com. 276, 279; Anderson v. Jackson, 16 Johns. (N.Y.) 382; Ide v. Ide, 5 Mass. 500; Hawley v. Northampton, 8 Mass. 41; Nightingale v. Burrell, 15 Pick. (Mass.) 104; Parker v. Parker, 5 Met. (Mass.) 134; 2 Saund. 388, note.)

If by the words, "decease without issue," the testator intended a definite failure of issue, that is, a failure of issue on the death of the first devisee, then the gift over is an executory devise.

Section 269, the phrase "dying without issued" explained:

Judge Napton voices the sense of the authorities when he says: "Conceding that the words 'dying without issue' mean an indefinite failure of issue, are there other words which, of themselves and in despite of this general manifestation of intention to keep the property indefinitely in the descendants of the first taker, point incontestably and unequivocally to the death of the first taker as the period contemplated by the testator when the limitation over should take effect?"

(*Chism v. Williams*, 29 Mo. 288.)

Under common law rulings a judge should never flinch in declaring that the words "failure of issue" mean an indefinite failure of issue. Unless the evidentiary facts abundantly warrant the *contra* holding. It is said that these strict methods of construction are greatly relaxed in favor of chattel interests, and any vague suggestion or intent will be seized upon as evincive of the testator's wish that the phrase "failure of issue" should be construed as a definite and not an indefinite failure. (*Allender v. Susan*, 33 Md. 11; 3 Amer. Rep. 171

³⁰ *Clayton v. Lowe*, 5 Barn. & Ald. 636; *Gee v. Mayor of Manchester*, 17 Adol. & Ell. (N. S.) 737; *Woodbourne v. Woodbourne*, 23 L. J. Ch. 336; *Doe v. Sparrow*, 13 East. 359; *Quackenboss v. Kingsland*, 102 N. Y. 128; *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 Id. 227; *Waugh's Appeal*, 70 Pa. St. 436; *Muckley's Appeal*, 92 Id. 514; but see *Britton v. Thornton*, 112 U. S. 526.

or with a direction that the devisee pay the legacy in respect to the estate so devised to him, and because the real estate has thus been devised, such real estate is in equity chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption; or from which it can be inferred that the testator intended to exempt the estate derived from that charge.³¹

³¹ *Harris v. Fly*, 7 Paige (N. Y.), 421; Willard's Eq. 489.

CHAPTER XVIII.

PERPETUITIES.

- SEC. 270. Definition and nature.
271. Development of the doctrine.
 a. Views of Mr. Jarman.
272. Hostility of the modern law.
273. Not applied to charitable trusts.
274. Judicial construction.
275. Tests applied.
276. *Thellusson v. Woodford* considered.
277. Statutory phases of the subject.

§ 270. **Definition and nature.** In *Philadelphia v. Girard*, 45 Pa. St. 9, Lowrie, C. J., said: "Perpetuities are grants of property, wherein the vesting of an estate or interest is unlawfully postponed,¹ and they are called perpetuities, not because the grant, as written, would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title, or of its vesting; or, as is sometimes, with less accuracy, expressed, to a perpetual prevention of alienation. According to this definition, a present gift to a charity is never a perpetuity, though intended to be inalienable,² and no vested grant is a perpetuity."

It is any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond; and in case of a posthumous child, a few months more, allowing for the term of gestation;³ or, it is such a limitation of property as renders it unalienable beyond the period allowed by law.⁴

¹ Saunders on Uses and Trusts, 196.

² 24 How. 495.

³ Randell on Perpetuities, 48.

⁴ Gilbert on Uses, by Sugden, 260, note.

Mr. Rand defines a perpetuity as any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and in case of a

"The particular feature," says Mr. Lewis, in his *Treatise on Perpetuities*, "in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or, in other words, of their becoming interests transmissible to the representatives of the grantee, devisee or legatee, and disposable by him. When they are so limited as necessarily to allow this quality, with the legal period of remoteness, they are free from objection in reference to the perpetuity rule." Upon this question we may also refer to *Miffin's App.* 121 Pa. 205; 1 L. R. A. 453. "If a remainder is vested, that is, if it is ready to take effect whenever the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond the life or lives in being."⁶

Thus it has repeatedly been held in Massachusetts that "a devise, subject to a conditional limitation void for remoteness, vests an absolute estate in the first taker."⁶ The same rule has been sanctioned in New York.⁷

posthumous child a few months more allowing for the term of gestation. (Rand, Perp. 48.) While Abbott's definition is a term applied to any attempt to restrict the alienation of land in such a way as forever to retain it for the benefit or in the enjoyment of the persons of a particular line of descent. (Law Dict. tit. "Perpetuity.")

⁵ Gray, *Perpetuities*, 209.

Mr. Saunders says: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee simple of the property, discharged of such future use or estate, before the event is determined, or the period is arrived when such future use or estate is to arise. If that period is within the bound prescribed by law, it is not a perpetuity." This describes the thing itself, and not the rule of law, or the

length of time, which may vary. Mr. Lewis gives a fuller definition: "A perpetuity is a future limitation, whether executory, or by way of remainder, and of either real or personal property, which is not to vest, until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation." (1 Perry on Trusts, 484.)

⁶ *Brattle Square Church Proprs. v. Grant*, 3 Gray, 142 (Mass.), 63 Am Dec. 725; *Theological Educational Soc. v. Atty.-Gen.* 135 Mass. 285.

⁷ *Manice v. Manice*, 43 N. Y. 383; *Tiers v. Tiers*, 98 N. Y. 568; *Dana v. Murray*, 122 N. Y. 604. See, also,

And generally it may be said that an executory devise must be so limited that by the terms of its creation it must take effect within the period prescribed for the vesting of future estates.

If the limitation be in such terms that it may or may not vest within that time it is void.⁹

§ 271. Development of the doctrine. The rule against perpetuities is of very extensive application, and in the legislation of every civilized nation on the globe, we find traces more or less italicized of the same idea that is embodied in our rule against perpetuities. Originally the rule owes its inception to judicial decision alone, entirely unaided by legislative enactment. And it will ever stand conspicuous among the many monumental exhibits of purely judge-made law. From time immemorial the English race has been peculiarly sensitive of all laws regulating real property, and in no direction has it displayed more thoroughbred antagonism than in those methods relating to the free alienation of lands. Aristocratic pretension and royal prerogative have manacled the freedom of transfer by laws of primogeniture and entailment. But the conviction is abroad and is every day gaining in momentum that public policy as well as common justice is opposed to the perpetual settlement of properties in such a manner as to make them practically inalienable — reserved from the commerce of the world so long as propagation can keep in being a person capable of taking

Outland v. Bowen, 115 Ind. 150; Coggins' App. 124 Pa. 10.

⁹ Caddell v. Palmer, 1 Clark & F. 372; 4 Kent's Com. 267; 1 Jarmon, Wills, 221; 4 Cruise, Dig. title 32, chap. 24, sec. 18; Nightingale v. Burrell, 15 Pick. (Mass.) 111; Atkinson, Conveyancing, 2d ed. 264; Brattle Square Church Proprs. v. Grant, 3 Gray, 142 (Mass.), 63 Am. Dec. 725; Lewis, Perpetuity, 163-172; Hooper v. Hooper, 9 Cush. (Mass.) 122; Thorndike v. Loring, 15 Gray (Mass.), 391; Fosdick v.

Fosdick, 6 Allen (Mass.), 41; Odell v. Odell, 10 Allen (Mass.), 1; Loring v. Blake, 98 Mass. 253; Sears v. Putnam, 102 Mass. 5; Joscelyn v. Nott, 44 Conn. 55; Donohue v. McNichol, 61 Pa. 73; Patterson v. Ellis, 11 Wend. (N. Y.) 259; Hawley v. James, 16 Wend. (N. Y.) 120; Schettler v. Smith, 41 N. Y. 344; Knox v. Jones, 47 N. Y. 389. Yates v. Yates, 9 Barb. (N. Y.) 324; Gott v. Cook, 7 Paige, 540, 4 L. ed. 256; Boynton v. Hoyt, 1 Denio (N. Y.) 53.

who answers the designation of some testator, who seeks to elude the usual effects of burial by forcing unborn generations to recognize his acts. It is quite interesting to trace the attitudes of antagonism assumed by the judiciary from time to time in regard to limitations upon testamentary devises. But in England it was not until the administration of Lord Melbourne in 1833 that the cap and bells were added to the rotund figure, and the rule against perpetuities appeared in full regalia. The celebrated case of *Cadell v. Palmer*, 1 Clark & Finley, 372, finally determined not only that children *en ventre sa mère* born after their father's death should be deemed to have been born in his lifetime for all purposes of inheritance, but also that the limitation which arrested the power of alienation for two lives in being should be extended for a period of nine months to allow for the period of gestation. In this manner, all legal estates, created by executory devise, conditional limitation, or shifting or springing uses — in other words, all estates in the nature of remainders must vest within a life or lives in being at the death of the testator and twenty-one years thereafter plus the period of gestation. And any estate so limited that it cannot vest absolutely in some one within that period is void. It has taken nearly three centuries to work this innovation on the common law, and yet it was regarded as a great achievement in its day. Every position was contested with the utmost violence. The first statute of William and Mary, passed at the close of the seventeenth century, was carried by a bare majority, and it was perilously close to utter extinction during the premiership of Sir Robert Walpole. Whatever its vicissitudes the rule is here — and here to stay. It was always easy to determine whether an executory devise contravenes the rule against perpetuities by this single inquiry, viz: Is it possible that the event or contingency upon which the estate must vest, may not occur or happen within the prescribed period limited by the rule? For if, by any possibility, the event might not happen within the time, the devise is obnoxious to the rule, and hence invalid. In all instances, under all circumstances, the contingency upon which the vesting of the estate hinges must be of such a character that it will infallibly occur sometime within the limit.

a. *Views of Mr. Jarman.* The rule against perpetuities is a salutary one, as is very conclusively shown by Mr. Jarman.⁹ This distinguished author says: "The necessity will be obvious if we consider for a moment what would be the state of a community in which a considerable proportion of the land and capital was locked up. That free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed, the improvement of land checked, its acquisition rendered difficult, the capital of the country gradually withdrawn from trade, and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity, and these restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all." He adds, in a note: "Perhaps these restrictions most frequently spring from the desire to exert a posthumous control over that which can no longer be enjoyed. *Te ten-eam moriens* is the dying lord's apostrophe to his manor, for which he forges these fetters, that seek by restricting the dominion of others to extend his own."

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A. who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period.

§ 272. **Hostility of the modern law.** As stated previously our laws are inexorably hostile to all efforts tending to clog the devolution of property, and to concentrate it within a narrow circle of pet beneficiaries who, following the wake of English ideas, seek to fasten the principles of primogeniture and entailment upon the course or property. Perpetuities directly antagonize the ends of social commerce by preventing free alienation and in all of the Federal States enact-

⁹ 1 Jarm. 250.

ments exist restraining the perpetuation of an estate beyond the period of two lives in being or one life plus twenty-one years plus the usual period of gestation in cases of posthumous birth. All that is required is that the estate shall vest within the prescribed period. The right of possession may be postponed longer and trusts created for beneficent purposes are relieved from the operation of the rule. The term has come to import any disposition of real property which is void because it infringes this "rule against perpetuities," such as a gift to A. for life, and after his death to such of his children as shall attain the age of twenty-five years.¹⁰

§ 273. **Not applied to charitable trusts.** *Relaxation of the rule.* The rule against perpetuities relaxes in favor of a trust for charitable objects as in such a case it is no objection to the validity of the trust that the property may remain in the hands of trustees and their duly appointed successors for all time to come.¹¹ Charities are universally favored both at law and in equity. And it would frustrate their beneficent designs were the rule against perpetuities allowed to operate. If, however, the charitable trust is to await the determination of a particular estate, and that particular estate may possibly endure beyond the period of a life or lives in being and twenty-one years thereafter, the charity will be held void. The cause of the perpetuity fastened upon the gift in the first taker.¹² It seems to me that common sense would suggest holding the charity good, and the particular estate void as in contravention of the rule. In any event it seems inequitable to annul the charity. Both might be preserved by allowing the particular estate to operate within the limitation, and not frustrate the testamentary design by recognizing the very estate that offends the rule.¹³

¹⁰ *Leak v. Robinson*, 2 Meriv. 363; *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 26; *McAuther v. Scott*, 113 U. S. 382; *Ould v. Washington Hospital*, 95 U. S. 312; *DeWolf v. Lawson*, 61 Wis. 473. See 141 Mass. 403.

¹¹ *Andrews v. Andrews*, 110 Ill. 223.

¹² *City of Philadelphia v. Gerard's Heirs*, 9 Wright, 29.

¹³ See *Jones v. Habersham*, 107 U. S. 185; *Detwiller v. Hartman*, 37 N. J. Eq. 354.

Charitable trusts usually commence in *presenti*, and on this account the question of remoteness seldom arises; they may, however,

In *Odell v. Odell*, 10 Allen (Mass.), 6, Gray, J., said: "The rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals does not apply to charities. These being established for objects of public, general and lasting benefits are allowed by the law to be as permanent as any human institution can be, and courts will readily infer an intention in the donor that they should be perpetual."

§ 274. **Judicial construction.** A cardinal rule of construction whenever questions relating to perpetuities have been before the courts is to regard the limitation as measured by lives only, or by some term that cannot in any event exceed two lives in being. Real property is never inalienable unless there is a contingent remainder, and the contingency has not yet occurred, and this is the meaning of the prohibition of perpetuities. Allowing that the cross-remainders are contingent they must be respected when they are within the period of two lives in being.¹⁴ Where there is an absolute suspension of the ownership for the prohibited period, the avails of the fund go to the residuary legatee.¹⁵

In the case of *Smith v. Edwards*, 88 N. Y. 92, the testator directed that \$30,000 should be kept invested until his youngest grandchild then born, or that might thereafter be born before the final distribution of his estate, should be of age. He then directed his executors to make distribution when his youngest grandchild born, and that might within twenty

begin in some future time, in which case they are not exempt from the operation of the rule against perpetuities.

A charitable trust differs from others in that it has no definite *cestui que trust*. There is no determinate person or persons possessing such positive right to the property given in trust as would enable him to transfer his interest by deed. It is no objection to a devise for a charity that it is so vague and indefinite that no particular person may have such an interest as will give him a right to demand its exe-

cution if there be a trustee named clothed with discretionary power to carry out the general objects of the power. (*Zeisweiss v. James*, 63 Pa. St. 465; *Whitman v. Lex*, 17 S. & R. [Pa.], 88; *Mayor, etc. of Philadelphia v. Elliott*, 3 Rawle [Pa.], 170; *Burke v. Roper*, 79 Ala. 142; See *Holland v. Alcock*, 108 N. Y. 312, 33; *Am. and Eng. Ency. of Law*, Vol. XVIII, p. 362.

¹⁴ *Kane v. Gott*, 24 Wend. (N. Y.) 641; *Knox v. Jones*, 47 N. Y. 398.

¹⁵ *Westerfield v. Westerfield*, 1 Brad. (N. Y.) 140; see *Rice's Probate Law*, 120.

years be born, should arrive at full age, or if a granddaughter, when she should be lawfully married. The parties to whom distribution was to be made were left uncertain until such time should arrive. The court held the bequest void by their statute of perpetuities.¹⁶

In the case of *Heald v. Heald*, 56 Md. 300, it was decided that where A. gave an equitable life estate to C., and a similar estate to his children surviving him, and the remainder absolutely to the issue of such children, it was held that the last limitation was void, as violating the rule against perpetuities.

§ 275. **Tests applied.** In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect.¹⁷ These rules are stated with great precision in 2 Atkinson on Conveyancing, 2d ed., 264.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect.

¹⁶ See, also, *Roberts v. Corning*, 89 N. Y. 225; *Purdy v. Hayt*, 92 N. Y. 446; *Schettler v. Smith*, 41 N. Y. 334; see *Rice's Am. Probate Law*, 270.

¹⁷ *Nightingale v. Burrell*, 15 Pick. (Mass.) 111; 4 Kent's Com. 283; 6 Cruise, Dig. tit. 38, c. 17, sec. 23.

To the suggestion that a will violates the rule against perpetuities or remoteness which prohibits the tying up of property beyond a life or lives in being and twenty-one years and a fraction thereafter, this test may be applied. Will the property within the period above named become vested in persons capable of conveying it?¹⁸ The old common law judges, acting under the tyranny of a thousand associations imperceptible to others, displayed the putrid sores of their pent up agony in ineffectual railings at the rule, and they employed the rich resources of scorn and invective in travesty of the principles upon which it was founded, only relinquishing their disparagement when death had silenced utterance. But let us not judge by the more liberal spirit of one generation those whose ideas were formed under the impulses and formulas of a generation that is past.

§ 276. *Thellusson v. Woodford*, 4 Ves. 227, considered. If it were necessary to vindicate the wisdom of our modern legislation on the subject of perpetuities, we have only to refer to this justly celebrated case as furnishing a most conclusive argument. One Thellusson, an English cutler, accumulated a property valued at about \$3,000,000. And in his anxiety to be regarded as the progenitor of a great ducal house he made a will in strict conformity with the then existing law, by which the immediate claims of children and grandchildren were utterly ignored, and the estate placed in the hands of trustees for investment with directions that it should be allowed to accumulate during the lives of all of his children and also during the lives of all of their children, and during the life of the survivor of the grandchildren — on the death of this last grandchild the property with its

¹⁸ *Waldo v. Cummings*, 45 Ill. 421; *Lunt v. Lunt*, 108 Ill. 307.

The Kentucky law is almost epigrammatic. "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being at the creation of the estate,

and twenty-one years and ten months thereafter." (Ky. Gen. St. ch. 63, art. 1, sec. 27.) Regulations of a similar import are all but universal, but no form of statutory expression has equaled the precision of the Kentucky enactment on this subject, while they all aim at the same result, and struggle to effectuate the same purpose.

accumulations was to be paid over to the eldest male heir. By every ordinary process of arithmetical calculation it will be seen that starting with the time of the testator's death, 1796, and continuing down to date, the fund in question would amount to considerably over \$100,000,000. A choice consistory of the ablest barristers in Great Britain contested this will through nine years of vehement litigation. But the House of Lords was obliged to decide, 1805, that the recitals of the will were not obnoxious to the rules of the common law, and that this pitiful exhibit of sumptuous vanity must be allowed to stand. It is doubtful if the entire range of English jurisprudence can furnish a more conclusive commentary upon the utter imbecility of common law provision. The courts successfully subdued a violent and imprudent passion for overriding the idiotic law, and it was the merciful mission of the case to inaugurate some drastic legislation that has since prevented the repetition of such an outrage. In this country, very generally, accumulations are allowed during the minority of one or more persons to commence with the creation of the estate out of which the accumulation is to spring, and to end with the minority of the persons designated. But it would appear that there are a few States still under the tyranny of the common law. And it would be highly interesting to know if, nearly a century after the passage of Thellusson's act by the English Parliament, such an outrageous testamentary scheme could be successfully developed in this country.

It is never to be expected that peaceful remonstrance or animated discussion will disturb the serenity of the common law zealot. Immersed in the deepest ooze of bigotry he can see nothing but celestial marvels in the old common law processes; nothing but wonders that are certainly "hid from the wise and prudent and revealed to babes." With this pet variety of monomaniac the fact that American law has reached its greatest development along lines widely diverging from English models is of no significance or moment. They are joined to their idols — let them alone.

CHAPTER XIX.

ESTATES UPON CONDITION.

- SEC. 278. Nature and definition.
279. Kinds of condition.
280. How created.
281. When conditions must be annexed.
282. Conditions not favored.
283. What conditions are repugnant to the estate granted.
284. Distinction between a condition precedent and a condition subsequent.
 a. Partial review of the authorities.
285. Invalid or void conditions.
286. Time of performance.
287. Rules relating to conditions.
288. To what estates conditions are annexed.
289. Distinction between estates upon limitation and conditional limitations.
290. Distinction between a condition and a limitation.
291. Who may enter for breach of condition subsequent.
292. Rule against perpetuities does not affect.

§ 278. Nature and definition. An estate upon condition is such that its existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created or enlarged, or finally defeated.¹ The operative words that are held to create a condition are "provided," "on account of," "if," and other words expressive of the intention. "Upon condition" is appropriate but it does not of necessity create a condition.² To fasten a condition upon the estate these words must be used in their technical sense. A condition precedent calls for the happening of some act or event before the estate can vest or be enlarged and a condition subsequent implies a non-performance or failure that will defeat an estate already vested, or effec-

¹ 2 Bl. Com. 152.

Wright v. Wilkins, 2 B. & S. 232 ;

² See Stanley v. Colt, 5 Wall. 119; Cassey v. Casey, 55 Vt. 520.

tually prevent an estate from vesting in the future.³ It is one that follows the agreement and tends to defeat or annul it upon the failure of either party to the transaction to comply with its terms.⁴ To determine the presence of either a condition precedent or subsequent resort must be had to the entire instrument and if its recitals clearly imply such an intent a qualification, restriction or stipulation will be construed as a condition that binds both parties.⁵ One distinction pervades the decisions on this subject which must be always borne in mind. A condition subsequent tends to defeat the vesting of estates, and is, therefore, in disfavor as creating friction and uncertainty, hence it will be strictly construed while a condition precedent must be literally observed, but as it is frequently dependent upon the performance of agreements to pay the consideration agreed upon, it is more equitable, although a failure to perform it will bar all relief, while our courts of equity are swift to relieve against a condition subsequent on the principle that if it was possible at the time of making it but the logic of events has been such as to render its performance impossible, as by act of God, the law, or the contumacy of the grantor, it would be a hardship to enforce its terms.⁶ Where the conditions are dependent and enter into the very essence of the contract, the performance of one hinges upon the performance of the other, and the prior condition must be first performed. In all cases where either party may be compensated for a breach of the condition they are regarded as mutual and independent.⁷ Conditions precedent, like all agreements, are frequently modified or mutually waived, which, of course, dispenses with their observance.

Repugnant conditions tend to subvert the estate and are properly disfavored, but conditions which prohibit certain uses of the property only are steadily enforced. Examples of such conditions occur in cases where the conveyance contains an inhibition as to the uses the property shall be de-

³ 2 Bl. Com. 154.

⁴ Jones v. United States, 96 U. S. 27; Story, Cont, sec. 40 *et seq.*

⁵ 4 Kent, 130; Lowber v. Bangs, 2 Wall. 736.

⁶ Davis v. Gray, 16 Wall. 229; Schulenburg v. Harriman, 21 Wall. 63.

⁷ Ruch v. Rock Island, 97 U. S. 693.

voted to, such as distillery, liquor nuisance, livery stable, tannery, soap factory, slaughter house, rubber factory, and the like. Such restrictions merely seek to limit the uses of the property.⁸

It is said in *Wheeler v. Walker*, 2 Conn. 196, s. c. 7 Am. Dec. 264, that "an estate on condition expressed in the grant or devise itself is where the estate granted has a qualification annexed whereby the estate shall commence, be enlarged, or defeated upon performance or breach of such qualification or condition."

Wherever the law annexes a condition it is because none are specified in the deed that will effectuate the purposes for which the estate was granted. Instances of such annexations frequently occur in the cases of corporate franchises, but in no case will conditions, however granted or annexed, be sustained if repugnant to the estate granted.⁹

§ 279. Kinds of conditions. Conditions are of two kinds—conditions precedent and conditions subsequent. A condition precedent is a condition upon the happening of which an estate will vest. A condition subsequent defeats an estate already vested.

It is a general rule as to conditions subsequent, that to be valid they must not be repugnant to the estate given or devised. They must not be an exception to the very thing, that is, to the substance of the gift; if so, they are void, and the estate granted will stand unaffected by such conditions. Thus, in *Blackstone Bank v. Davis*, 21 Pick. 42, it was held that "a condition in a grant or devise that the grantee shall not alienate, is void, because repugnant to the estate." Also, in *Bradley v. Peixoto*, 3 Ves. 324, it was held that an exception to the very thing itself by way of condition is null. 2 Washb. on Real Prop. 6, lays down the doctrine clearly that a condition subsequent, inconsistent with and repugnant to, the amplitude of the powers of the estate granted, is void, and therefore, no condition.¹⁰

Some of the text books indulge in considerable refinement

⁸ *Camp v. Clearly*, 76 Va. 143; ⁹ *Schermerhorn v. Negus*, 1 Den. Cowell v. Colo. Spgs. Co. 100 U. S. (N.Y.) 448.
57; *Smith v. Barrie*, 56 Mich. 317. ¹⁰ *Rice*, Am. Pro. Law, 147.

over "conditions positive" or "conditions affirmative," and "conditions negative or collateral." These are all mere fanciful forms of condition,—just as we have chemical, electrical and thermal facts, but if we observe the corollary that here concerns us, it will be abundantly apparent that such attenuated reasoning only obscures a subject already intricate, while it accomplishes no practical result. Copulative or disjunctive conditions, possible and impossible conditions, are, after all, as matter of law, regarded as either "subsequent" or "precedent," and as such are amenable to the action of the court upon the due exhibition of a proper bill or declaration. It is a mystery ever pressing for interpretation, how these hypocritical "views" obtained a lodgement in our substantive law unless upon the theory that pedantic specialists, anxious to discover something that does not exist, seek to impose upon the profession some "barbaric yawp in the form of foolfrenzy about conditions negative." Sir William Hamilton in his trenchant criticism of Cousin says "no one was ever either edified or fructified by senseless refinements." Generally it may be affirmed that our courts treat with scant respect a construction that tends to a forfeiture of the estate. Uniformly they will hold words which may reasonably be treated as covenants or restrictions, as not amounting to a condition.¹¹

§ 280. How created. This estate springs into being either by virtue of express words contained in a deed or conveyance

¹¹ *Adams v. Valentine*, 33 Fed. Rep. 4, see opinion of Wallace, J.

Jurists of great eminence have constantly declaimed against the mania for perpetuating the senseless jargon of the dark ages in our legal annals, and publicists of equal eminence have studiously avoided the constant parade of obsolete medieval terms in their legal diction. Many text writers have been equally sturdy in their evasion of technique, but unfortunately the fad seems inherent with many others to perpetuate names and phrases that should become obliv-

ionized. There is a constant itch to display profundity, scholarship and research, by parading terms that are suggestive only of refinement. How many times we meet with the phrase "*cestui que trust*," an agglomeration of bastard Latin, that simply means "beneficiary." The entire science of the law is permeated with this error, and it is among the aims of the present undertaking to avoid as far as possible any perpetuation of this abomination by substituting the English equivalents for all these Latinized terms.

(conditions in deed), or by implication of law (conditions in law). It is all but universal to create a condition by the use of such phrases as "provided always," or "if it should so happen," or "this is with the express proviso," or words of similar import. Conditions are regarded in a dual aspect. 1, As general; in which case, if the condition is violated, there is an end of the tenancy immediately on entry for breach of the conditions; and, 2, As special; in which event the reversioner only is at liberty to enter, and hold the land as security until the condition be fulfilled.¹²

§ 281. **When conditions must be annexed.** On this side of the Atlantic estates upon condition or conditional estates are of comparatively rare occurrence. In nearly all leases we can detect the presence of conditions, and the same remark applies to mortgages. But both of these interests in real property are sufficiently eminent to constitute a class by themselves. Public policy seems to insist that real property should always be in a transferable condition—more of a commodity than in former times, and more easily converted into its cash equivalent. Wherever conditions do exist they must invariably be annexed at the time the estate is created in which they appear as an incident. The reason is very obvious, for the grantor, after parting with the title to the property, is powerless to fasten any conditions upon it—the estate has passed from him. He is no longer in control, the conditions he would like to annex are then impossible, except with the concurrence of the new grantee, who would be most apt to resent any clogging of his fee; hence, whatever conditions accompany an estate must be annexed thereto at the time the estate is created.¹³ The condition, if subsequent, will never limit or abridge the title. Whatever quality of estate passes with a condition subsequent is in no way determined by the condition. It does not manifest itself in any obnoxious manner except when it appears for the purpose of annihilating the estate. It strikes but once. Not to mar or deface, but for the sole purpose of blotting out of existence. It may well be then that such a power should always be

¹² Co. Litt. 202a; 4 Kent's Com. 36; 2 Bl. Com. 154. ¹³ 2 Co. Litt. 236b.

incorporated in the recitals of the instrument which creates the estate to the end that, whoever takes a property, menaced by a condition subsequent, may know the exact scope and nature of the condition he is dealing with. And how can he know this unless the grantor be required to indicate the condition at the time he creates the estate.

§ 282. Conditions not favored. It is a rule of extended application in this country — one always in the ascendancy — that all forms of conditions subsequent which tend to defeat the estate should be discouraged. Such elements impart a degree of uncertainty as to the tenure that should not be encouraged — they foist an element of distrust into real estate holdings, and they breed a litigious spirit that it is one object of all law to allay. Hence it has become a settled rule of construction that a condition will be strictly interpreted, and where effect is given to one it must be because the language employed is so directly pointed as to have but one object, and one meaning, viz., the creation of a condition subsequent.¹⁴

§ 283. What conditions are repugnant to the estate granted. "The owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."¹⁵ The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter houses, soap factories, distilleries, livery stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from

¹⁴Craig v. Wells, 11 N. Y. 315; Cullen v. Sprigg, 83 Cal. 56; Sumner v. Darnell, 128 Ind. 38.
¹⁵Chute v. Washburn, 44 Minn. 312;

¹⁵Sheppard, Touch. 129, 131.

unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods."¹⁶

If an estate is granted and conditions repugnant to the estate granted are annexed thereto, the latter will be void, and the estate will pass freed from such conditions."¹⁷

The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised."¹⁸ For the same reason a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable."¹⁹ And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation."²⁰

¹⁶ Field, J., in *Cowell v. Springs*, Co. 100 U. S. 55.

¹⁷ *Wilkinson v. Wilkinson*, 3 Swanst. 515; *Re Macleay*, L. R. 20 Eq. 187; *Smith v. Bell*, 31 U. S. 6 Pet. 68 (8: 322); *Caruthers v. McNeill*, 97 Ill. 256; *Murfitt v. Jessop*, 94 Ill. 158; *Rountree v. Talcot*, 89 Ill. 246; *Brownfield v. Wilson*, 78 Ill. 470; *Markillie v. Ragland*, 77 Ill. 98; *Lowrie v. Ryland*, 65 Iowa, 584.

¹⁸ Lit. sec. 360; Co. Litt, 206b, 223a; 4 Kent's Com. 131; *McDonough v. Murdoch* (56 U. S.), 15 How. 367, 373, 375, 412 (14: 732, 735, 736, 752.)

¹⁹ *Howard v. Carusi*, 109 U. S. 725 (27: 1089); *Ware v. Cann*, 10 Barn. & C. 433; *Shaw v. Ford*, L. R. 7 Ch. Div. 669; *Re Dugdale*, L.

R. 38 Ch. Div. 176; *Corbett v. Corbett*, L. R. 13 Prob. Div. 136; *Steib v. Whitehead*, 111 Ill. 247, 251; *Kelley v. Meins*, 135 Mass. 231, and cases there cited.

²⁰ *Roosevelt v. Thurman*, 1 Johns. Ch. 220; 1 L. ed. 119; *Mandlebaum v. McDonnell*, 29 Mich. 78; *Anderson v. Cary*, 36 Ohio St. 506; *Twitty v. Camp*, Phil. Eq. (N. C.), 61; *Re Roscher*, L. R. 26 Ch. Div. 801.

The weight of authority, and especially of reasoned authority, is against the validity of restraints upon alienation, however limited in time. 1. A restraint against alienation until the devisee's eldest (unborn) son reaches twenty-one, was held bad in *Roosevelt v. Thur-*

The authorities are very generally agreed that property cannot be conveyed, devised, or bequeathed with a restriction against it, or any portion of it, going to assignees in bankruptcy or in any form to creditors, although a grant may be made which shall be determinable by way of cesser, or by limitation of the estate over to another upon the occurrence of a certain event; such as insolvency, bankruptcy, or the occurrence of any other act or event arising out of the conduct or neglect of the grantee or devisee. The bounty of a grantor or testator may, however, be secured to another by means of a trust—a “spendthrift’s,” as it is sometimes called; so that the periodical income of the estate cannot be anticipated by the *cestui que trust*, but may be paid to him from time to time, beyond the power of creditors to intercept or reach it. Many such cases are collated and cited in *Nichols v. Eaton*, 91 U. S. 717, 727; 23 L. ed. 254, 257, and the whole subject is fully considered in *Broadway Nat. Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504, and *Foster v. Foster*, 133 Mass. 179. This topic has received extended treatment in the chapter on Uses and Trusts.

§ 284. **Distinction between a condition precedent and a condition subsequent.** There is a wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be

man, 1 Johns. Ch. 220; 2, Oxley v. Lane, 35 N. Y. 340, 346, 347. Here the court, after saying that it had been doubted whether conditions imposing partial restrictions upon alienation were good, held that they were certainly bad if they violated the rule against perpetuities; 3. A condition not to sell until the devisee reached thirty-five was held

bad in *Twitty v. Camp*, Phil. Eq. (N. C.), 61; 4, *Mandlebaum v. McDonnell*, 29 Mich. 78. Here Christianity, J., in an elaborate opinion, shows the lack of authority for the validity of restraints against alienation limited in time, and the court holds that such restraints are void (Cited from *Gray on Restraints on Alienation*, p. 31.)

applied, giving damages, if damages should be given, and the proper amount can be ascertained.²¹ By the common law a freehold estate could not be created without livery of seizin, and it could not be determined without some act in *pais* of equal notoriety. Conditions subsequent are not favored in law,²² and when they are sought to be enforced in an action at law, there must have been a re-entry, or something equivalent to it, or the suit must fail. The right to sue at law for the breach is not alienable. The action must be brought by the grantor or some one in privity of blood with him.²³ In *Dumpor's Case*, 4 Co. 119, it was decided that a condition not to alien without license is finally determined by the first license given.

The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute.²⁴

a. *Partial review of the authorities.* Conditions, as previously stated, are either precedent or subsequent; in other words, either the performance of them is made to precede the vesting of an estate, or the non-performance to determine an estate antecedently vested.²⁵

Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged; they admit of no latitude; they must be strictly, literally and punctually performed.²⁶ Where one takes an estate with power to sell, depending on a contingency, the happening of the contingency is a condition precedent to his right to sell. A deed made by him before is void.²⁷

A devise of land "for the purpose of building a school house, for the use of a school, provided it be built" on a

²¹ Wells v. Smith, 2 Edw. Ch. (N. Y.) 78; Beaty v. Harkey, 2 Sm. & M. 563.

²² 4 Kent's Com. 129.

²³ Nicoll v. R. R. Co. 12 N. Y. 121; Ludlow v. R. R. Co. 12 Barb. (N. Y.) 440; Webster v. Cooper, 14 How. Pr. (N. Y.) 488.

²⁴ Co. Litt. 206a, 208b; 2 Bl. Com. 156; 4 Kent's Com. 130; Davis v. Gray, 83 U. S. 203.

²⁵ 1 Jarm. on Wills (2d Am. ed.), 671, marg. p. 796.

²⁶ Van Horne v. Dorrance, 2 Dall. 317, per Patterson, J.

²⁷ Minot v. Prescott, 14 Mass. 495.

certain site, is a condition subsequent.²⁸ So of a devise to a town, to use and improve forever, and not to be sold, but rented out, and the rents applied to the ministry of the town.²⁹

Where there is a general devise in words importing a present interest, in a will making no other disposition of the property, on a condition that may be performed at any time, the condition is subsequent.³⁰ And where a testator devises his estate to his wife "to hold the same to her and her heirs forever, on condition, however, that my said wife shall support and maintain in a comfortable and suitable manner my aged and infirm mother, should my mother survive me," the devise is upon a condition subsequent, and the estate is subject to forfeiture for neglect of performance.³¹ The devisee becomes entitled to enter upon and enjoy the estate until forfeited; and no one can take advantage of a breach of such condition, and make an entry to create a forfeiture of the estate, but an heir-at-law of the devisor.³²

Where a devise of real estate is made on a condition subsequent, and, after the devisee becomes lawfully seized, a breach of the condition happens, the estate thereby passes to the residuary devisee, and not the heirs-at-law. And on the death of the residuary devisee before condition broken, the estate passes to his heirs.³³

If performance of a condition subsequent be rendered impossible, the estate to which it is annexed becomes, by that event, absolute.³⁴

It is far from clear, however, that this principle applies even to conditions subsequent, if the property be given over on non-performance.³⁵

²⁸ *Hayden v. Stoughton*, 5 Pick. (Mass.) 528.

²⁹ *Brigham v. Shattuck*, 10 Pick. (Mass.) 306.

³⁰ *Finley v. King*, 3 Pet. 376.

³¹ *Marwick v. Andrews*, 25 Me. 525.

³² *Id.*

³³ *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Brigham v. Shattuck*, 10 Id. 306; *Clapp v. Stoughton*, 10 Id. 463.

³⁴ *Thomas v. Howell*, 1 Salk. 170; *Laughter's case*, 5 Rep. 22; 2 P. Wm. 626; 2 Story, Eq. Jur., sec. 1304, *et seq.*; 4 Kent (7th ed.), 124-127; *McLachlan v. McLachlan*, 9 Paige (N. Y.), 534; *Merrill v. Emory*, 10 Pick. (Mass.) 507; *Hughes v. Edward*, *post*, 489.

³⁵ 1 Jarm. on Wills (2d Am. ed.), 679, marg. p. 807; 2 Atk. 16; *Peyton v. Bury*, 2 P. W. 626; *King v. Withers*, 1 Eq. Ca. Ab. 112, pl. 10.

A condition, in view of the common law, is regarded as impossible only when it cannot, by any human means, take effect. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is then not deemed impossible.³⁶

If a grant is made on a condition subsequent, and the performance becomes impossible by the act of the grantor, the condition is void.³⁷

In *Houston v. Randolph County Comrs.*, 20 Ind. 398, the conveyance was to "the board of trustees of the county seminary of Randolph county, and their successors in office, forever to have and to hold the premises aforesaid, with all the appurtenances, to the only proper use, benefit and behoof of said board of trustees, for the use of said seminary forever." It was claimed that this created a *condition subsequent*, and that the premises ceased to be used as a seminary, the grantor was to receive the land. The court held that the corporation received an unconditional title, which was not defeated, by the alleged failure to use the premises for the purposes of a seminary, or by using them for other purposes, that there was nothing in the deed that imports a condition; and that if the grantor intended that the property conveyed should only be used for a seminary edifice, or, in case it should be used otherwise, that the estate should be forfeited and revert; the condition should have been expressed or fairly implied. In *Seebold v. Shitler*, 34 Pa. 133, land upon which a court house and jail had been erected was conveyed to the commissioners by name, and their successors in office, "in trust for the use of said county, in fee simple." The county was subsequently divided, the seat of justice removed, and the trustees appointed to sell the lots. Held, that there was no reverter.

The citation of authorities to this effect might be greatly extended, but we will refer to the following:³⁸

³⁶ 2 Story, Eq. Jur., sec. 1305.

³⁷ *United States v. Arredondo*, 6 Pet. 691, 745; *Whitney v. Spencer*, 4 Cow. (N. Y.) 39.

³⁸ *Raley v. County of Umatilla*, 15 Or. 173; *Portland v. Terwilliger*, 16 Id. 465; *Coffin v. Portland*, 16 Id.

77; *Columbia First M. E. Church v. Old Columbia Pub. G. Co.* 103 Pa. 608; *Paschall v. Passmore*, 15 Id. 307; *Rawson v. Uxbridge School Dist. No. 5*, 7 Allen (Mass.), 125; *Packard v. Ames*, 16 Gray (Mass.), 327; *Crane v. Hyde Park*,

In *Clark v. Jones*, 1 Den. 576, Chief Justice Bronson, after a critical review of the authorities, felt constrained to carry the rule as to conditions subsequent to an extent heretofore unknown in the decisions of this country. He emphatically denied the right of a tenant to take advantage of his own wrong, and terminate a lease by a willful omission to pay rent. Where, says he, there is a condition in a lease that upon the neglect or failure of the tenant to pay rent — or for some other default or improper conduct on his part, the lease shall cease and determine, or shall become null and void — the neglect to pay rent or the like will not render the lease absolutely void. It is void as to the estate of the lessee who has done the wrong, but as to the lessor the lease is voidable only. He may dispense with the forfeiture, and affirm the continuance of the lease.

§ 285. Invalid or void conditions. A condition may be so manifestly absurd — so obviously beyond the possibility of accomplishment — that the courts will declare it void *ab initio* by simply resorting to the familiar maxim: "The law never requires an impossibility." Testators frequently seek to maintain their quarrels after death by annexing an illegal condition to a devise, as "provided and on the condition my said son shall cease to live with his present wife," etc.

In *Blackstone Bank v. Davis*, 21 Pick. 41, 32 Am. Dec. 241, it was held that a provision, in a devise of land, that the land should not "be subject or liable to conveyance or attachment," was void, because contrary to law, which makes a man's property liable for the payment of his debts. In that case, the condition was unlimited in point of time; and it was declared to be "an attempt to impose a restraint upon property, which the law would not allow."

In *Bramhall v. Ferris*, 14 N. Y. 44, 67 Am. Dec. 113, while sustaining the provision there in question, it was said that

135 Mass. 147; *Sohier v. Trinity Church*, 109 Id. 1; *Board of Suprs. v. Patterson*, 56 Ill. 111; *Lawe v. Hyde*, 39 Wis. 347; *Weir v. Simmons*, 55 Id. 637; *Brown v. Cadwell*, 23 W. Va. 187; *Southard v. Central R. Co.* 26 N. J. L. 14; *Barrie v. Smith*,

47 Mich. 131; *Gage v. School Dist. No. 7*, 64 N. H. 232, 4 New Eng. Rep. 284; *Page v. Palmer*, 48 N. H. 387; *Morrill v. Wabash, St. L. & P. R. Co.* 96 Mo. 174; *Thornton v. Trammell*, 39 Ga. 202.

“any attempt to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory, * * * would clearly be repugnant to the estate in fact devised and bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law.” This view is sustained in *Hahn v. Hutchinson*, 159 Pa. 133, 138-141; *Stansbury v. Hubner*, 73 Md. 228; 11 L. R. A. 204; *Steib v. Whitehead*, 111 Ill. 251; *McCormick Harvesting Machine Co. v. Gates*, 75 Iowa, 343; *Ehrisman v. Sener*, 162 Pa. 577.

§ 286. Time of performance. Where the testator seeks to make a payment of money or any other specific act as a condition precedent to the enjoyment of the estate, but neglects to specify when the act is to be done, the courts will usually insist upon performance within a reasonable time.” Of course, if the time is specified in the instrument creating the estate, the time must govern. In other cases the time of performance will be regulated by the general condition of the estate, situation of the parties, and the probable intention of the one creating the condition.

§ 287. Important rules relating to conditions. Text writers have been conspicuously unfortunate in their general treatment of estates upon condition, in that certain fundamental rules that are always of application seem to have been entirely ignored or but incidentally referred to. After laborious investigation I have discovered but one writer who has successfully grouped the various rules relating to conditions, and by displaying them in logical order has greatly abridged and simplified the entire subject. The writer is Professor Walker, in his inimitable work known as “American Law.” Indeed it may be said that this book, in its tenth edition, is the most marvelous piece of condensation in the entire range of legal literature. Its merits are universally acknowledged, and I merely add to a great weight of present obligation by referring to section 142, where will be found a complete tabulation of the important rules relating to estates upon condition. Those rules are phrased by Dr. Walker in the manner following:

³⁹ *Nicoll v. N. Y. & E. R. R. Co.* 13 N. Y. 121.

1. Conditions must be annexed at the time of creating the estate, and not afterwards; because, when an estate is once created, the grantor's power is at an end.

2. Conditions must operate upon the whole estate. But a condition may operate upon part of the land and not upon the rest. Thus, one-half might be made to revert, upon a certain event. There may be good reason for this distinction under the technical rules of the common law, but I can perceive none in the nature of the subject. And a condition cannot be severed. A grant of a part of the reversion will defeat the whole condition.⁴⁰

3. Conditions can only be reserved to the grantor and his heirs. Except by statutory provision, they cannot be reserved to strangers.⁴¹ Forfeiture, by breach of condition, can only be taken advantage of by the grantor or his heirs.⁴² A right of entry on condition broken passes only to heirs, and is not devisable or assignable.⁴³

4. Conditions which are impossible at the time of making them, or which afterwards become impossible by the act of God, or by the act of the grantor himself, are void; and an estate already vested thus becomes absolute. The reason is, that the moment that a condition becomes impossible, it ceases to be a condition in the sense intended by the grant; and when this is not the fault of the grantee, he is not to be prejudiced thereby. Accordingly, the estate being vested, he holds it discharged of the condition.

5. Conditions, the performance of which is unlawful, are void. Thus, if I grant you an estate, the continuance of which depends upon your doing something which is illegal or immoral, or omitting something which is your duty, the condition is void, and the estate which is vested becomes absolute.⁴⁴

6. Conditions which are repugnant to the nature of the

⁴⁰ *Tinkham v. Erie R. R. Co.* 53 Barb. (N. Y.) 393.

⁴¹ *Underhill v. Saratoga & Washington R. R. Co.* Barb. (N. Y.) 455.

⁴² *Dewey v. Williams*, 40 N. H. 222; *Hooper v. Cummings*, 45 Me. 359.

⁴³ *Southard v. Cent. R. R. Co.* 2 Dutch. 13; *Norris v. Nilner*, 20 Ga. 563.

⁴⁴ *Bradford v. Bradford*, 19 Ohio St. 546, 548.

estate are void. But the grantor may prohibit alienation to a particular person;⁴⁵ for this is not within the reason of the rule. So, if the estate be for life or years, a condition against alienation will be good, for here is no repugnancy to the nature of the estate. And in this case, a sale on execution will not be considered as an alienation so as to defeat the estate. But the condition may interfere with or control the mode of enjoyment of the estate. Thus, a condition against partition has been held valid.⁴⁶ So, also, one against the sale of intoxicating liquors on the premises sold.⁴⁷ And a condition in a grant of a fee-simple, that a perpetual rent shall be paid, is valid.⁴⁸

Two rules may be framed as being generally accepted: 1, A forfeiture or limitation over an alienation of a fee-simple is void, unless alienation merely to specific persons is forbidden, or unless the condition takes effect to prevent the estate vesting, i. e., is a condition precedent to its vesting. But as to all other estates, whether in tail, for life, or for years, such a limitation is valid. 2, A clause prohibiting alienation, but without forfeiture or limitation over, i. e., leaving the estate in the owner's hands without power to alienate, is wholly void as to every estate, whether legal or in trust, excepting only married women's separate property trusts. See Gray on Restraints on Alienation for a full statement of rules and all the cases. In Ohio it has been specifically ruled that a condition in a devise in fee restraining alienation is void.⁴⁹ So is a condition that land be exempt from the devisee's creditors.⁵⁰ So is a condition forbidding alienation, except to a certain person, even for a few years.⁵¹ An exception to the second rule above given occurs in Pennsylvania, and lately in Massachusetts.⁵² And see, also, Miller, J., in *Nichols v. Eaton*, 91 U. S. 716, permitting a testator to devise a life interest or lesser interest in trust for the support

⁴⁵ Langdon v. Ingram, 28 Ind. 360.

⁴⁶ Hunt v. Wright, 47 N. H. 396.

⁴⁷ Plum v. Tubbs, 41 N. Y. 442.

⁴⁸ Van Rensselaer v. Barringer, 39 N. Y. 9.

⁴⁹ Anderson v. Cary, 36 Ohio St. 506.

⁵⁰ Hobbs v. Smith, 15 Id. 419.

⁵¹ Anderson v. Cary, 36 Ohio St. 506.

⁵² Broadway Bank v. Adams, 133 Mass. 170.

of the beneficiary, but free from claims of his creditors. Some States by statute also allow a certain amount of income to be thus limited. The name of "spendthrift trusts" has attached to these.⁵³

7. Conditions in absolute prevention of marriage are void on grounds of public policy, except in the case of widows taking lands from their deceased husbands.⁵⁴ But the grantor may provide that the grantee shall not marry without his consent; because this does not absolutely prevent marriage.

8. Conditions may be performed by any person having an interest in the subject-matter. And if a particular time be appointed, the performance must be at or before the time. The law is strict on this subject, though equity will relieve against mere failure in point of time.

9. Equity will relieve against all forfeitures for breach of conditions, where a compensation can be made in damages; and this renders the legal doctrines respecting conditions of little practical consequence. A court of equity will not allow its powers to be used in any way to assist to divest an estate for a breach of a condition subsequent.⁵⁵

10. When the condition has been broken, the grantor may, by his own act, debar himself from taking advantage of it. Thus, where a lease contains a clause for re-entry, for non-payment of rent at a certain time, and the lessor accepts rent afterwards, he cannot enter for condition broken.

The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable.⁵⁶

To authorize a person to claim a forfeiture of valuable property rights on account of the violation of a condition upon which they are granted, he must proceed to enforce it

⁵³ See Gray on Restraints on Alienation, *passim*.

⁵⁴ *Lingart v. Ripley*, 19 Ohio St. 24; *Commonwealth v. Steuffer*, 10 Barr. 350; *McCullough's Appeal*, 12 Pa. St. 197; but see, *Parsons v. Winslow*, 6 Mass. 169; *Otis v. Prince*, 10 Gray (Mass.), 581.

⁵⁵ *Smith v. Jewett*, 40 N. H. 530; *Livingston v. Tomkins*, 4 Johns. Ch. 431; *Warner v. Bennett*, 31 Conn. 468.

⁵⁶ *Rice v. Boston & Worcester Railroad Co.* 12 Allen (Mass.), 141.

at once. He cannot remain passive for a long time after acts have transpired, upon which others have relied in matters of importance to them, and then insist upon the forfeiture in consequence thereof.

It is quite true that it may be regarded as in some sense a general rule that forfeiture cannot be insisted upon, unless a party entitled to take advantage of the condition first demands performance of that upon which the continuance of the estate depends.⁵⁷

This rule applies in the class of cases where the performance of the condition depends upon something to be done by the party entitled to insist upon performance, or upon his election at pleasure, or upon facts or circumstances peculiarly within his personal knowledge. In other words, where it in any way depends on the pleasure of the party for whose benefit the condition is to be performed in what manner or at what time a thing shall be done, or whether it shall be done at all, the party to be benefited must request performance.⁵⁸

Where, however, the continuance of an estate depends upon the performance of a specified act which is to be done at a fixed time, no demand is necessary; because the party bound has equal knowledge of the thing to be done, and of the time when it is to be done. He must, therefore, tender performance at his peril, or make it appear that performance has been expressly waived.⁵⁹

While a condition may be waived by a party who has the right to avail himself of it, mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless some element of estoppel can be invoked.⁶⁰

Where lands are conveyed subject to certain conditions, and the grantor reserves a right of re-entry for a failure by the grantee, or his heirs, to comply with those conditions, the original grantor or his heirs can maintain ejectment to

⁵⁷ *Lindsey v. Lindsey*, 45 Ind. 552; *Cory v. Cory*, 86 Id. 567; *Ellis v. Elkhart Car Works Co.* 97 Id. 247.

⁵⁸ *Whitton v. Whitton*, 38 N. H. 127.

⁵⁹ *Ellis v. Elkhart Car Works Co.*

supra; *Rowell v. Jewett*, 69 Me. 293; *Whitton v. Whitton*, *supra*; 1 Shars. & B. Lead. Cas. Real Prop. 145.

⁶⁰ *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115, and cases cited.

retain possession on such breach; but, ordinarily, as before stated, no one else can do so.⁶¹ In such a case all of the original grantors or their heirs must join as plaintiffs.⁶²

Where lands are granted in fee, upon condition of the payment of a yearly rent, reserving a right of re-entry on breach of that condition, the grantor, or his heir, assignee or devisee, except where restrained by some particular statute, can maintain ejectment for the land in case of default in payment of such rent.⁶³ If there is more than one heir, each is allowed to sue for his share.⁶⁴

§ 288. To what estates conditions are annexed. Conditions either precedent or subsequent may be lawfully annexed to any species of real property that takes the form of a transferrable estate. Equitable estates are most frequently clogged with a condition.⁶⁵

§ 289. Distinction between estates upon limitation and conditional limitations. This distinction proceeds upon the well recognized qualities of the two estates. An estate upon limitation collapses absolutely upon the happening of an event which may determine it. As where a woman takes an estate so long as she remains a widow. Now, during her widowhood, she holds an estate upon limitation, and the moment of her marriage her estate collapses or determines, and passes to other channels.

There is a tendency among text writers to overlook the distinction between limitations and conditional limitations, and so eminent an authority as Mr. Washburn falls into this error.⁶⁶ But it appears to be the better method to apply the term "conditional limitation" to the estate which takes effect, and "limitation" to the estate which is determined.⁶⁷

"Between a condition and a conditional limitation there is

⁶¹ *Nicoll v. N. Y. & Erie R. R. Co.* 12 N. Y. (2 Kern.) 121; *Jackson v. Topping*, 1 Wend. (N. Y.) 388.

⁶² *Cook v. Wardens, etc. of St. Paul's Church*, 5 Hun (N. Y.), 293.

⁶³ *Van Rensselaer v. Slingerland*, 26 N. Y. (12 Smith) 580; *Van Rensselaer v. Barringer*, 39 N. Y. (12

Tiff.) 9; *Moore v. Wingate*, 53 Me. 398; *Galbraith v. Fenton*, 2 Serg. & R. (Pa.) 359.

⁶⁴ *Cruger v. McClaury*, 41 N. Y. (2 Hand) 219.

⁶⁵ 2 Bl. Com. 152.

⁶⁶ *Tiedeman on Real Prop.* sec. 281.

⁶⁷ *Id.*

this difference: a condition respects the destruction and determination of an estate; a conditional limitation relates to the commencement of a new one. A condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger."⁶⁸

Cases of conditional limitation partake of the nature of

⁶⁸ Watkins, Convey. 204.

A limitation imports an estate so expressly confined and limited by the words of its creation that it cannot endure for a longer time than till the contingency shall happen upon which the estate is to fail. This is denominated a *limitation*; as, when land is granted to a man while he continues unmarried, or until the rents and profits shall have made a certain sum, and the like; in these cases the estate is limited, that is, it does not go beyond the happening of the contingency, (2 Bl. Com. 155; 10 Co. 41; Bac. Ab. Conditions, H., Co. Litt. 236b, 4 Kent's Com. 121; Tho. Co. Litt. Index, h. t., 10; Vin. Ab. 218; 1 Vern. 483, n.; 4 Ves. Jr. 718.)

2. There is a difference between a limitation and a condition. When a thing is given until an event shall arrive, this is called a limitation; but when it is given generally, and the gift is to be defeated upon the happening of an uncertain event, then the gift is conditional. (2 Bouvier's Law Dict. 50.)

A conditional limitation is a species of limitation of an estate, partaking of the nature of a condition. (4 Kent's Com. 127.) As if a condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation. (Id. 126.) Sometimes considered as

the same with a remainder. (Id. 128, notes, Id. 249, 250.)

This term is used in other senses than the foregoing. Thus, it is said, that a conditional limitation is where an estate is so expressly defined, and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail. (1 Steph. Com. 278.) And to this class are referred all base fees and fees simple conditional at the common law. (Id.; 1 Burrill's Law Dict, tit. "Conditional Limitation.")

In a note under section 22 of his work, "Restraints on Alienation," Mr. Gray speaks of the confusion of usage as follows:

"The term 'Conditional Limitation' is used in two senses. In the sense in which it is generally employed by courts and writers, it is a generic term, comprising two species (1) shifting uses, and (2) executory devises, and is a proviso cutting short an estate previously created and substituting another in its stead. It is very convenient to have such a common term for shifting uses and executory devises; but unfortunately, some writers have confused legal nomenclature by attempting to use it in another sense. With them it means a proviso operating to determine an estate by intrinsic force, but not by itself substituting another

conditions; but they are cases of contingency, and to be adjudged upon the principles applicable to contingent estates. Their distinguishing characteristics are, that they contain a condition either to divest an estate vested, or to prevent the vesting of an estate contemplated, and to carry over the interest to another party, or to some other purpose, not to the heir. Whereas, it is indispensable to the legal idea of a condition that it should enure to the benefit of the heir, that he should enter, and that the effect of entry should be the restoration of the original estate, not the creation of a new estate. A conditional limitation is comprised among executory devises, and, therefore, can be created by will alone, but estates on condition may be created by deed or will. As to the estate to be created or carried over, as well as in those instances in which it anticipates or prevents an estate from vesting; it is obvious that conditional limitations must be assimilated to conditions precedent. But as the contingency may also operate to divest an estate taken presently, it is equally obvious that it then approximates to a condition subsequent in one of its effects. In either case, however, it is regarded as a contingency, and the law of conditions is not applied to it to any purpose that would defeat the estate of the second taker. It is, on the contrary, so molded and applied as may give effect to the devise over."

§ 290. Distinction between a condition and a limitation.

While the distinction between a condition and a limitation is sufficiently intelligible, it is surprising to discover the amount of misconception on the subject. Here is a formula that may disembarass some minds who are a little foggy as to the exact nature of the distinction. A condition does not defeat the estate even in case it is broken, until actual or constructive entry of the grantor or his heirs. But words of limitation mark the period which determines the estate. The event or contingency beyond which one is not permitted to doubt that the estate has terminated.

A "condition" determines an estate after breach, upon entry or claim by the grantor or his heir, or the heir of the devisor. A "limitation" marks the period which determines

⁶⁹ Finlay, et al. v. King's Lessee, 3 Pet. 391.

the estate without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. A "conditional limitation" is, therefore, of a mixed nature, partaking both of a condition and a limitation; of a condition, because it defeats the estate previously limited; of a limitation, because upon the happening of the contingency the estate passes to the person having the expectant interest, without entry or claim.⁷⁰

§ 291. Who may enter for breach of condition subsequent.

It must not be inferred that because there has been a breach of a condition subsequent, however notorious such breach may be, that the estate is thereby forfeited. But, on the contrary, it will always require some affirmative or aggressive act by which the property is reduced to possession before the estate of the grantee will be defeated. The modern action of ejectment is a possessory action having all of the legal effects of the old common law action of entry and detainer. It is the remedy most in vogue for enforcing the reversioner's rights in all cases where the estate has been forfeited through the breach of a condition subsequent. The rule is well settled that in order that an estate on condition may revest in the grantor by breach of the condition, he, if not in possession, must make entry to bring action, or, if in possession, must manifest intent to hold possession 'by reason of the breach.'⁷¹

It is optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate thus granted. To do this requires action on his part; and if he is not in possession, usually requires an entry for breach of condition. Until such entry, the grantee holds his estate,

⁷⁰ Proprietors of Brattle Square Church v. Grant, 3 Gray (Mass.), 147 (1855), Bigelow, J.; see, also, 4 Hughes, 594; 16 Me. 160; 5 Neb. 407; 73 N. C. 125; 5 R. I. 212; 76 Va. 145;

18 Ves. 433; 2 Washb. R. P. 457-60; Cited from Anderson's Law Dict.

⁷¹ Webster v. Cooper. 55 U. S. (14 How.), 488; Chalker v. Chalker, 1 Conn. 79; Dewey v. Williams, 40 N. H. 222,

liable only to be defeated, but not actually determined by a forfeiture.⁷²

It is equally well settled that a mere breach of condition will not revest an estate in a grantor upon condition, except at his election; and that he may waive the breach and forfeiture.⁷³

It further appears that conditions can only be reserved to the grantor or his heirs, and never to mere strangers. And the grantor must, during his life time, take proper steps to consummate the forfeiture. Or, if he be dead, those in privity of blood with him must adopt the same measures. But, in the meantime — that is, after the breach of the condition subsequent and before any action of re-entry has been commenced — only a right of action subsists, and this mere right of action cannot be conveyed so as to vest the right to sue in a stranger.⁷⁴

There is a wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained.⁷⁵ The action must be brought by the grantor or some one in privity of blood with him.⁷⁶

There would seem to be some authority for holding that in case the grantor or his heirs are in possession of the property — actually living on the premises — the estate re-vests immediately upon breach of the condition without any entry or further formal act on his or their part.⁷⁷ While it is universally true that a stranger cannot avail himself of a breach

⁷² *Stone v. Ellis*, 9. Cush. 95.

⁷³ *Co. Litt.* 211, b; *Coon v. Brickett*, 2 N. H. 163; 1 *Shep. Touchstone*, 152; *Pennant's case*, 3 Co. 64.

⁷⁴ *Ruch v. Rock Island*, 97 U. S. 693.

⁷⁵ *Wells v. Smith*, 2 Edw. Ch. (N.

Y.) 78; *Beaty v. Harkey*, 2 Sm. & M. 563.

⁷⁶ *Nicoll v. R. R. Co.* 12 N. Y. 121; *Ludlow v. R. R. Co.* 13 Barb. (N. Y.) 440; *Webster v. Cooper*, 14 How. (N. Y.) 488.

⁷⁷ See *Lincoln & Kennebec Bank v. Drummond*, 5 Mass. 321; *An-*

of a condition subsequent, the rule is relaxed in landlord and tenant cases. In all such instances the lessor may assign his right of entry on breach of condition to an entire stranger with or without consideration. Any other holding would seriously embarrass property rights of a rentable character.

And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.⁷⁸

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as was said in a late case, "The mode of asserting or resuming the forfeited grant is subject to the legislative authority of the government. It may be

draws v. Senter, 32 Me. 394; Hamilton v. Elliott, 5 S. & R. 375; Adams v. Ore Knob Copper Co., 12 Rep. C. C. 166.

⁷⁸ Shep. Touch., 149; Nicoll v. R. Co., 12 N. Y. 121; People v.

Brown, 1 Cai. 416; U. S. v. Repentigny, 5 Wall, 267 (72 U. S. XVIII, 645); Dewey v. Williams, 40 N. H. 222; Hooper v. Cummings, 45 Me. 359; Southard v. R. R. Co., 2 Dutch. (N. J.) 13.

after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.””

§ 292. **Rule against perpetuities does not affect.** In this country we seem to have ignored the English precedents which subject estates upon condition to the rule against perpetuities, and wholly emancipated such estates from the operation of that very salutary rule. No reason can be assigned for this partiality. We apply the rule in all its rigor to the case of an executory devise, why not to an estate upon condition? A number of instances have arisen where conditions offending the rule against perpetuities have been upheld.” In none of these cases last cited, however, did the rule against perpetuities control the action of the court or influence the decision. And the American judiciary seem to have tacitly agreed to the validity of conditions in a conveyance beyond the period allowed by the rule against perpetuities. True there is no decision directly in point. But no court has directly committed itself to the proposition that a condition was void because it seeks to fasten an impediment upon the alienation of real estate beyond the period prescribed by the rule against perpetuities. In the *Cowell* case, *supra*, Mr. Justice Field, voicing the unanimous opinion of the United States Supreme Court, held that the condition in the deed, which prohibited the manufacture or sale of intoxicating liquors as a beverage at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but on the contrary it was imposed in the interest of public health and morality. There is no suggestion in the opinion that the condition might become void by efflux of time, and his honor refers with entire approval to the cases of *Plumb v. Tubbs*, *supra*, *O'Brien v. Wetherell*, 14 Kan. 616, and *Gray v. Blanchard*, 8 Pick, (Mass.) 284.

⁷⁹ *U. S. v. Repentigny*, *supra*; 38 Wis. 165; *Plumb v. Tubbs*, 41 N. Finch v. Riseley, Poph. 53; *Schulenberg v. Harriman*, 88 U. S. 44. Y. 442; Indianapolis R. R. Co. v. Hood, 60 Ind. 580; *Cowell v. Colorado Springs Co.*, 100 U. S. 55.

⁸⁰ *Horner v. Chicago R. R. Co.*, 100 U. S. 55.

CHAPTER XX.

MORTGAGES.

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§ 293 **Preliminary.** The assertion is abundantly warranted that of all the topics and subdivisions known to the law of real property, that relating to mortgages has received the most systematic and exhaustive treatment. Bench, bar and commentator have been assiduously engaged for over three hundred years in comparing views, luminating obscurities, eliciting argument, and formulating rules with the sole object of placing the doctrine of mortgages beyond the reach of controversy, to the end that this most important species of property should possess something of the same certainty that is imparted to a promissory note. It would, indeed, be a reproach to the judicial system of the civilized world, if, after all these centuries of exploiting, the principles that underlie the law of mortgages as well as their variant applications should remain in doubt, especially when we remember that thousands upon thousands of cases have contributed their quota to the subject. Fortunately we are not obliged to chronicle such a failure. On the contrary, the result has been most encouraging, and in these closing hours of the nineteenth century the student in the labyrinth of the laws of real property will be gratified to learn that in one department, at least, we have reached bed-rock foundation, and that the legal and equitable principles governing the law of mortgages have now assumed all the symmetrical proportions of settled law. Whatever confusion may reign in other subdivisions, the rules regulating mortgages, and also deeds, have acquired great precision and uniformity, especially since the phenomenal development of our equity jurisprudence during the last half century. With these introductory remarks, I shall now briefly examine the salient features of

our mortgage law, as related to Real Property and endeavor to present a synoptical review of the very simple principles that underlie the entire superstructure.

§ 294. **Nature and definition.** A mortgage of realty is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession. It can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property.¹

This term imports, under the modern decisions, a provisional transfer of property, as security for some indebtedness already owing or for some definite sum to be hereafter advanced. In judicial contemplation it is simply a lien (although of a very high character) or encumbrance upon the property of the debtor, which becomes discharged by the due performance of the contract of repayment. In effect, it is a sale accompanied with a power of defeasance which, if not observed, may result in an absorption of the title by the mortgagee (the creditor). The sum secured by the mortgage is called the "mortgage debt," while the method of absorption is technically known as an action of foreclosure — a proceeding long recognized as an effective remedy in the hands of the creditor by which he acquires possession of the security as indemnity for his claim.² They are always designed to secure the payment of money or to enforce the performance of some act *in futuro*.

Any transaction which ultimately resolves itself into a security for a loan is, in legal contemplation, a mortgage.³

¹ Mr. Coote briefly defines a mortgage as "a debt by specialty secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches." (Coote on Mortg., 139.) And Professor Walker says they are mere pledges to secure the

payment of money, and are usually treated under the head of estates upon condition. (Walker's Am. Law, sec. 145.)

² Conrad v. Atlantic Ins. Co. 1 Pet. 441; 4 Kent's Com. 136; Terrell v. Allison, 21 Wall. 293; Williamette Mfg. Co. v. Bank, 119 U. S. 198.

³ Wilcox v. Morris, 1 Murph. 116, 3 Am. Dec. 678; Wilmerding v. Mitchell, 42 N. J. L. 476; New Or-

While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet, there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act, or it cannot be construed to be a mortgage.⁴ Another expression of the same idea might assume this language: An instrument clearly indicating the creation of a lien, accurately describing the property affected by that lien, and the amount of the debt to be secured is, in legal effect, a mortgage.⁵ The debt is the principal thing to be considered, and the mortgage is merely an incident, although a very important one. The two are inseparable, and whatever discharges the debt will discharge the mortgage, but the mortgage may be discharged without a payment of the debt.⁶

A mortgage is, in some jurisdictions, held to be a conditional sale, vesting the title in the mortgagee upon the non-fulfillment of the condition. Another theory is that it merely creates a lien on the property, to secure the payment of a debt, to be enforced by foreclosure. Some courts incline to take a middle ground not wholly endorsing either of these positions.

a. *Distinction between a mortgage and a conditional sale.* The test of the distinction between a mortgage and a conditional sale is this: If the relation of debtor and creditor remains and a debt still subsists it is a mortgage; but if the debt be extinguished by the agreement of the parties or the money advanced is not by way of a loan, and the grantor has the privilege of refunding, if he pleases, by a given time and thereby entitle himself to a reconveyance, it is a conditional sale.⁷

leans Nat. Bk. Assn. v. Adams, 109 U. S. 211; Peckham v. Haddock, 36 Ill. 38; Heburn v. Warner, 112 Mass. 273.

⁴ New Orleans Nat. Bk. Assn. v. Adams, 109 U. S. 211.

⁵ Burnside v. Terry, 45 Ga. 621; Sargent v. Howe, 21 Ill. 148; Baldwin v. Jenkins, 23 Miss. 306.

⁶ Vason v. Ball, 56 Ga. 268; Timms v. Shannon, 19 Md. 269;

Blackwell v. Barnett, 52 Tex. 326; Mack v. Wetzlar, 39 Cal. 247; Trimm v. Marsh, 54 N. Y. 599; Glass v. Ellison, 9 N. H. 69; Brinkman v. Jones, 44 Wis. 498; Hurley v. Estes, 6 Neb. 386.

⁷ 4 Kent's Com., 5th ed., 144, note e; Snively v. Pickle, 29 Gratt. 27, 34, 35; Slutz v. Desenberg, 28 Ohio St. 371, 376, 377; Flagg v. Mann, 14 Pick. 467, 478; Glover v.

b. *Regarded as a conveyance.* In *Harkrader v. Leiby*, 4 Ohio St. 612, the court said: "It is incorrect to say that a mortgage does no more than to create a mere lien upon the property. It operates as a conveyance of the estate, by way of pledge or security for the debt, and gives to the mortgagee the benefit of all the doctrines applicable to *bona fide* purchasers." "A mortgagee is deemed a purchaser *sub modo*. He is so regarded every day under the statute respecting fraudulent sales, and protected within the saving clause in favor of subsequent purchasers."⁸

c. *Trust deeds in the nature of a mortgage.* Deeds of trust are quite generally in vogue in several of the States, and have many features of availability that recommend them as ample security for an investment. They take the form of an absolute conveyance to a third person who is clothed with the character of a trustee to sell the property conveyed, discharge the incumbrance thereon, and reserve the balance for the benefit of the grantor. These so-called deeds of trust are, in legal contemplation, nothing more than mortgages, and are subject to all of the legal and equitable incidents of a mortgage. Being trust estates they are, of course, in no way liable for any indebtedness of the trustee, and his death, insanity, or incapacity from any cause, in no way impairs any rights of a mortgagor or mortgagee, as the court is at all times ready to grant any relief the situation may call for, either by the appointment of a new trustee, or by a restraining writ upon the old one.⁹

Payn, 19 Wend. 518, 520, 521; *Slowey v. McMurray*, 27 Mo. 113, 115, 116; *Galt v. Jackson*, 9 Ga. 151, 156; *Spence v. Steadman*, 49 Id. 133, 141; *West v. Hendrix*, 28 Ala. 227, 234; *Ruffier v. Womack*, 30 Tex. 332, 341, 342; *Pitts v. Cable*, 44 Ill. 103; *Magnusson v. Johnson*, 73 Id. 156; *Hicks v. Hicks*, 5 Gill & J. 75, 81, 83, 86; *McNamara v. Culver*, 22 Kan. 661; *Budd v. Van Orden*, 33 N. J. Eq. 143.

⁸Per Nelson, Ch. J., in *Frisbey v. Thayer*, 25 Wend. 399; *United*

States v. Fisher, 6 U. S. 2 Cranch, 2 L. ed. 304.

⁹See, generally, on the subject of trust deeds, *McDoald v. Kellogg*, 30 Ark. 170; *Fox v. Fraser*, 92 Ind. 265; *Fitch v. Weatherbee*, 110 Ill. 475; *Union Company v. Sprague*, 14 R. I. 452; *Martin v. Alter*, 42 Ohio St. 94; *State Bank of Bay City v. Chappelle*, 40 Mich. 447; *Lance's App.* 112 Pa. St. 456; *Stafford Nat. Bank v. Sprague*, 17 Fed. Rep. 748.

A deed of trust is a modern invention by which the equity of redemption is supposed to be foreclosed without the aid of a court of equity, and without the vexatious and interminable delays incident to a foreclosure suit.¹⁰

d. *Absolute deeds construed as mortgages.* This topic more properly affiliates with the annotation in the succeeding chapter of Deeds, which see.

e. *Competency of parol evidence to establish the character of the agreement.* The Supreme Court of the United States, and the Circuit and District Courts, and most of the State courts are uniform in admitting parol evidence to show that an absolute conveyance is in fact a mortgage.¹¹

§ 295. **Objects of a mortgage.** "The first great object of a mortgage," says Chief Justice Shaw, in *Ewer v. Hobbs*, 5 Met. 1-3, "is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition and ownership of the estate, subject only to the first purpose — that of securing the mortgagee."

So the object of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act.¹²

Courts treat as mortgages conveyances conditioned for the support and maintenance of mortgagees or others.¹³

¹⁰ *Conway's Executors v. Alexander*, 7 Cranch, 218.

¹¹ *Jones*, *Mortg.* 3d ed., sec. 285, *et seq.*; *Russell v. Southard*, 53 U. S. 12 How. 139, 13 L. ed. 927; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Morris v. Nixon*, 42 U. S. 1 How. 118, 11 L. ed. 69; *Babcock v. Wyman*, 60 U. S., 19 How. 289, 15 L. ed. 644.

¹² 2 *Swift*, Dig. 183; *Robinson*, *Elementary Law*, sec. 102; 2 *Washb. Real Prop.*, 4th ed., 475; *Tiedeman*, *Real Prop.* sec. 296; *Lanfair v.*

Lanfair, 18 Pick. 304; *Erskine v. Townsend*, 2 Mass. 493; *Mitchell v. Burnham*, 44 Me. 299; *Wing v. Cooper*, 37 Vt. 179; *Lund v. Lund*, 1 N. H. 41.

¹³ 1 *Jones*, *Mort.* sec. 388; *Austin v. Austin*, 9 Vt. 420; *Fiske v. Fiske*, 20 Pick. 499; *Flanders v. Lamphear*, 8 N. H. 201; *Daniels v. Eisenlord*, 10 Mich. 454; *Bresnahan v. Bresnahan*, 46 Wis. 386; *Hiatt v. Parker*, 29 Kan. 765; *Bryant v. Erskine*, 55 Me. 153.

§ 296. **Classified as legal and equitable — Welsh mortgages obsolete.** For all practical purposes mortgages may be regarded as falling within one of two different classes. That is to say, they are either legal or equitable. The first comprise the ordinary well known form of mortgage with which we are so familiar. But the second class rather eludes exact definition. In a vague, general sense, all mortgages may be said to be equitable. But in strict legal parlance, an equitable mortgage is any lien upon real estate of a character recognized in a court of equity as security for money due. Instances of this grade of mortgage occur in all cases of unpaid purchase money, and the term equitable mortgage is also applied to that form of security created by a law when a creditor, as security for his advances, takes to himself the muniments of title which his debtor has, as evincive of his rights. Under our recording acts, such a security is a very shadowy affair. As between the parties, they are, of course, perfectly valid. But as against a stranger, without notice of any outstanding equities, they are the merest rubbish. There are a class of text writers who cannot restrain a propensity to drone over a third class of mortgages known to the forgotten pundits of the last century as Welsh mortgages. If such securities ever rose to the dignity of forming a distinct class, they have succeeded in extinguishing themselves most effectually, and in this country they are utterly obli-
vionized.¹⁴

a. *Vendor's lien for the purchase price.* Equity adopts the theory that until the payment of the price agreed upon, the vendee simply holds the land in the capacity of a trustee. And all persons having knowledge of such facts are bound to recognize it. As between the parties the rule has every feature of commendation. Still it has a tendency to vest the grantee or vendee with the ostensible ownership of property in which he may have very limited interest. And hence, the doctrine is utterly repudiated in several jurisdictions, and doubted in some others.¹⁵

¹⁴ Angier v. Masterson, 6 Cal. 61.

¹⁵ The following cases sustain such liens: Salmon v. Hoffman, 2 Cal. 138; Kirkham v. Boston, 67 Ill.

599; Johnson v. McGrew, 42 Ia. 555; Payne v. Avery, 21 Mich. 524; Chase v. Peck, 21 N. Y. 518; Williams v. Roberts, 5 Ohio, 35; Gor-

The Connecticut, New Hampshire, and Rhode Island decisions seem to leave the matter in doubt. Ordinarily the lien will last as long as the debt does, but it is subject to waiver, and the Statute of Limitations may be relied upon to defeat it. It attaches to all permanent improvements placed upon the land, and is such an interest in real estate as will pass by assignment.

As a creditor is at liberty to receive all the securities his debtor is willing to give, if there is any evidence, which, in character and amount, shows an intention to retain both the collateral security and a lien for the purchase price, such intention will be allowed to govern.¹⁶

§ 297. Essential elements. In every valid mortgage there will be found several essential elements, and each of these elements should appear in the instrument which is relied upon as constituting a mortgage. First, There must be a mortgagor, that is to say, there must be a person or corporation (which is nothing more than an aggregation of individuals), endowed with sufficient capacity to grant, convey, or assign the land mortgaged. And it is a further prerequisite that the person or corporation must not be laboring under any legal impediment or disability. Secondly, There must be a mortgagee, or a person or corporation endowed with capacity to receive a grant or assignment of the land mortgaged. And, thirdly, There must be a landed estate capable of being mortgaged.¹⁷

A fourth essential relates to the consideration, and this must be valuable or good. And lastly, the document should be duly executed, delivered, and recorded.¹⁸ In regard to the consideration necessary to uphold the mortgage it may be

don v. Bell, 50 Ala. 213; Bradford v. Marvin, 2 Fla. 463; Yarborough v. Wood, 42 Tex. 91; Willard v. Reas, 26 Wis. 540; Shall v. Cisco, 18 Ark. 142. The rule is utterly repudiated in the following cases: Steven's App., 38 Pa. St. 9; Ahrens v. Odiorne, 118 Mass. 261; Philbrook v. Delano, 29 Me. 410; Smith v. Rowland, 13 Kan. 245.

¹⁶ Elliott v. Plattor, 43 Ohio St. 198.

¹⁷ Neligh v. Michenor, 11 N. J. Eq. 539.

¹⁸ Lawrence v. Tucker, 64 U. S. 14; Robinson v. Brennan, 115 Mass. 582; McKinster v. Babcock, 26 N. Y. 378; Shirras v. Caig, 11 U. S. 34.

said, that it must be grounded upon the payment of money or its equivalent, or the performance of some specified obligation. The term consideration has a fixed legal import. According to Mr. Anderson, a "good consideration" sometimes means a consideration which is valid in point of law, and it then includes a meritorious, as well as a valuable, consideration. But it is more often used in contradistinction to valuable consideration.¹⁹

a. *No precise form required—rule as to acknowledgment and sealing.* There is no precise phraseology employed in the drafting of a mortgage. If the court, without doing violence to the plain import of language, can spell out of the terms employed a general intent to pledge property as security for the forbearance or loan of money, the transaction is, in legal effect, a mortgage.²⁰ Several States have adopted a statutory form that it would be well to follow. But there can be no serious objection to adopting some other form, and as mortgages are always within the special cognizance of an equity court, it is inconceivable that the mere failure to observe the puerilities of a form—at least in a transaction of this character—should operate disastrously to any meritorious litigant. Courts look at the substance not at the shadow, and are not supposed to be infatuated with any particular aggregation of words. Quite generally the mortgage should be witnessed and acknowledged, and a seal will never vitiate, although not in all instances required. The rule as to sealing is far from uniform, and wherever any doubt exists upon the subject the safer method is to put them on.²¹ Signing, delivery and acceptance are all necessary.²²

b. *The defeasance clause examined.* The terms of the defeasance may or may not be inserted in the mortgage deed, although the former method is very generally observed.²³

¹⁹ Anderson's Law Dict.

²⁰ Burnside v. Terry, 45 Ga. 621; Deleon v. Higuera, 15 Cal. 483.

²¹ Hebron v. Centre Harbor, 11 N. H. 571; Woods v. Wallace, 22 Pa. St. 171; Ross v. Worthington, 11 Minn. 438; Vanthornilly v. Peters, 26 Ohio St. 471; Jones v.

Berkshire, 15 Ia. 248; Todd v. Outlaw, 79 N. C. 235.

²² Tisher v. Beckwith, 30 Wis. 55; Bell v. Farmers' Bank, 11 Bush. 34; Goodman v. Randall, 44 Conn. 321.

²³ Edrington v. Harper, 3 J. J. Marsh. 353; Whitney v. French, 25 Vt. 663; Warren v. Lovis, 53 Me. 463.

And if the latter is adopted the instrument which is evincive of its terms should be of as high a character as the conveyance it may ultimately defeat, and should be delivered simultaneously with the mortgage deed, although it is not necessarily under the same date.²⁴ Regarding this matter of date, while it is a matter of great significance, we may say that it is rarely, if ever, of *controlling importance*. Dates are quite generally subject to contradiction, and an erroneous date or an impossible date does not touch the substance of the matter. The presumption would be indulged that the date given is correct, and that the delivery and execution both occurred on that day, but this presumption may be rebutted.²⁵ The vital point is to establish the real day when it was given, but the date on the instrument by no means concludes the inquiry.²⁶ As previously stated the presumption as to the date is open to explanation and rebuttal.²⁷

§ 298. Covenants and their construction. In mortgages of real property, and in bonds secured thereby, the following or similar covenants must be construed as follows:

a. *Agreement that whole sum shall become due.* The words "and it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of said mortgagee or obligee after default in the payment of interest for days, or after default in the payment of any tax or assessment for days, after notice and demand," must be construed as meaning that should any default be made in the payment of the said interest, the aforesaid principal sum,

²⁴ Richardson v. Woodbury, 43 (19 How.), 73, 15 L. ed. 525; Sweetser v. Lowell, 33 Me. 446.

²⁵ Richardson v. Ellett, 10 Tex. 190; Dodge v. Hopkins, 14 Wis. 630; Cole v. Howe, 50 Vt. 35; Serviss v. Stockstill, 30 Ohio St. 418; Cook v. Knowles, 38 Mich. 316; Stockham v. Stockham, 32 Md. 196; Draper v. Snow, 20 N. Y. 331; McComb v. Gilkey, 29 Miss. 146; Gately v. Irvine, 51 Cal. 72; McCrary v. Caskey, 27 Ga. 54; Abrams v. Pomeroy, 13 Ill. 133.

²⁶ Morgan v. Whitmore, 6 Exch. 726; Glenn v. Grover, 3 Md. 212; Anderson v. Weston, 6 Bing. N. C. 296; Ellsworth v. Central R. Co. 34 N. J. L. 93; Sinclair v. Baggalay, 4 Mees. & W. 312; Williams v. Woods, 16 Md. 220.

²⁷ Raines v. Walker, 77 Va. 92; United States v. LeBaron, 60 U. S.

with all arrearage of interest thereon, shall, at the option of the said mortgagee or obligee, his executors, administrators, successors or assigns, become and be due and payable immediately thereafter.

b. *In default of payment, mortgagee to have power to sell.* A covenant that the mortgagor "will pay the indebtedness, as provided in the mortgage, and if default be made in the payment of any part thereof, the mortgagee shall have power to sell the premises therein described, according to law," must be construed as meaning that the mortgagor for himself, his heirs, executors and administrators or successors, covenants and agrees to pay to the mortgagee, his executors, administrators, successors and assigns, the principal sum of money secured by said mortgage, and also the interest thereon. And if default shall be made in the payment, then and from thenceforth it shall be lawful for the mortgagee, his executors, administrators or successors to sell and dispose of the same, and all benefit and equity of redemption of the said mortgagor, his heirs, executors, administrators, successors or assigns therein, at public auction, and as the attorney of the mortgagor for that purpose duly authorized, constituted and appointed, to make and deliver to the purchaser a good and sufficient deed for the same in fee simple, and out of the moneys arising from such sale, to retain the principal and interest which shall then be due, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money unto the mortgagor, his heirs, executors, administrators, successors or assigns.

c. *Mortgagor to keep buildings insured.* A covenant "that the mortgagor will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee," must be construed as meaning that the mortgagor, his heirs, successors and assigns will keep the buildings erected on the premises insured against loss or damage by fire, to an amount and in a company to be approved by the mortgagee, and will assign and deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, and in default of so doing, that the mortgagee or his executors, administrators, succes-

sors or assigns, may make such insurance and that the mortgagor will pay to the mortgagee, his executors, administrators, successors or assigns, such premium or premiums so paid, with interest from the time of payment, on demand, and that the same shall be deemed to be secured by the mortgage.

d. *Mortgagor to give further assurance of title.* A covenant that the mortgagor "will execute any further necessary assurance of the title to said premises, and will forever warrant said title," must be construed as meaning that the mortgagor shall and will make, execute, acknowledge and deliver in due form of law, all such further or other deeds or assurances as may at any time hereafter be reasonably desired or required for the more fully and effectually conveying the premises by the mortgage described.

e. *Covenants to bind representatives of grantor and mortgagor and enure to the benefit of whom.* All covenants contained in any grant or mortgage of real estate binds the heirs, executors, administrators, successors and assigns, of the grantor or mortgagor, and enure to the benefit of the heirs, executors, administrators, successors and assigns of the grantee or mortgagee in the same manner and to the same extent, and with like effect as if such heirs, executors, administrators, successors and assigns were so named in such covenants, unless otherwise in said grant or mortgage expressly provided.

§ 299. **What property may be mortgaged.** Any interest in real property which is capable of being transferred may be mortgaged.²⁸ But any conveyance of land, in the actual possession of a person holding by virtue of a title hostile to that of the grantor, is absolutely void. Still in the case of a mortgage it is entirely competent for the grantor, having a just title, to execute a mortgage on the land notwithstanding some person is in adverse possession of the same land. Such is the New York rule, but the doctrine is repudiated in Alabama.²⁹

²⁸ Dorsey v. Hall, 7 Neb. 460; Neligh v. Michenor, 11 N. J. Eq. Hagar v. Brainard, 44 Vt. 294; 539.

Crane v. Turner, 7 Hun (N.Y.), 357; ²⁹ Vandiveer v. Stickney, 75 Ala. Sinclair v. Armitage, 12 N. J. Eq. 174; 225.

a. *Rule as to after-acquired property.* A mortgage having the "after-acquired property" clause will be construed as covering not only the property owned by the mortgagor, but all property subsequently acquired which comes within the description of the mortgage.³⁰ And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquires only a full equitable title.³¹

A mortgage on after-acquired property is an executory agreement for the non-performance of which the mortgagee may recover compensation in damages as against the mortgagor; but as against the grantee of the purchaser at the sale, the lien of the mortgage cannot embrace property not acquired by the mortgagor.³²

§ 300. **Parties to a mortgage.** A good general rule as to parties may be thus stated: Any person having a grantable interest in real estate, and who is not under any legal disability, may execute a valid deed or mortgage.³³ And it is well settled that such a person may delegate his right to another by virtue of a power of attorney. Where such an instrument authorizes the execution of a deed or mortgage, it must be in writing, subscribed, acknowledged, or proved, certified and recorded in like manner as powers of attorney for grants of real property. For further discussion see "Parties to a Lease," *ante*, p. 257.

§ 301. **Description of the mortgaged premises.** As there is an extended discussion of this topic in our subsequent chap-

³⁰ Pennock v. Coe, 64 U. S. (23 How.), 117 (16: 436); Dunham v. Cincinnati, P. & C. R. Co. 68 U. S. (1 Wall.), 254 (17: 84); Galveston, H. & H. R. Co. v. Cowdry, 78 U. S. (11 Wall.), 459 (20: 199); Thompson v. White Water Valley R. Co. 132 U. S. 68 (33: 256).

³¹ Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296 (33: 905); Central Trust Co. of N. Y. v. Kneeland, 138 U. S. 414.

³² Metropolitan Nat. Bank v. St. Louis Dispatch Co. 149 U. S. 436;

Watkins v. Wyatt, 9 Baxt. (Tenn.), 250; Jessup v. Bridge, 11 Ia. 572; Morrill v. Noyes, 56 Me. 458; Williams v. Winsor, 12 R. I. 9; Phillips v. Winslow, 18 B. Mon. (Ky.), 431; Beall v. White, 94 U. S. 382; United States v. New Orleans R. Co. 79 U. S. 362; Benjamin v. Elmira R. Co. 49 Barb. 441, 54 N. Y. 675; McCaffrey v. Woodin, 65 N. Y. 459.

³³ Campbell v. Tompkins, 32 N. J. Eq. 170; Payne v. Patterson, 77 Pa. St. 134.

ter on deeds, it is only necessary in this connection to say that the same rules obtain as to the description of the premises mortgaged as would be resorted to in determining the location of the same premises had they been conveyed by a warranty deed. The pivotal concept in each case is to determine the intent of the party. And the tendency is to construe the mortgage, in this particular, against the mortgagor as he should not be heard to say that a description framed or dictated by himself was incapable of indefinite location.³⁴

The cases even go to the extent of holding that the omission of the name of the State or county or township in which the mortgaged premises are situate will not, necessarily, invalidate the mortgage, provided there are other substantial elements of identification that may be resorted to with confidence.

§ 302. Fixtures as between mortgagor and mortgagee. Some of the most exasperating questions in the entire law of real property have arisen in controversies about fixtures, and it is said that the question, whenever it arises, between mortgagor and mortgagee, is to be governed by the same rules that are applied in the case of a grantor and grantee.³⁵

It becomes very apparent that the uncertainty infesting this topic can be greatly harmonized if we cease to look for any arbitrary formula that will fit all cases.

§ 303. Validity of the debt secured. Validity of the mortgage may be said to depend entirely upon the validity of the debt. If the latter is one condemned by the policy of law, the mortgage given to secure it is a nullity.³⁶ But where a mortgage is given to secure a series of debts, some of which are recognized by law, while others are not, those having a legal status will enjoy the security of the mortgage only.³⁷

³⁴ See *Tryon v. Sutton*, 13 Cal. 490; *Murphy v. Hendricks*, 57 Ind. 593; *Ryan v. United States*, 136 U. S. 68; *Thompson v. Building Asso.* 103 Ind. 279; *Starling v. Blair*, 4 Bib. 288; *Usina v. Wilder*, 58 Ga. 189; *Cowley v. Shelby*, 71 Ala. 122; *Bunker v. Anderson*, 32 N. J. Eq. 35; *Slater v. Breese*, 36 Mich. 77.

³⁵ *Clove v. Lambert*, 78 Kan. 224; *Voorhees v. McGinnis*, 48 N. Y. 278; see *ante*, sec. 15, *et seq.*

³⁶ *Shaw v. Carpenter*, 54 Vt. 155; *Gilbert v. Holmes*, 64 Ill. 548; *Feldman v. Gamble*, 26 N. J. Eq. 494.

³⁷ *Shaw v. Carpenter*, *supra*.

§ 304. Mortgage for future advances. The immense expansion of trade and commerce, in recent years, has sanctioned the validity of a mortgage given to secure future advances. And it would seriously embarrass all forms of commercial transaction were the courts to adopt a view hostile to this form of security. They have become a recognized form of security, and have many features of commendation that give them great repute, especially with banking institutions and all those who are directly concerned in loaning money. Whatever arguments may be brought against the practice, nothing can at this late day impeach the validity of such a transaction, or find any substitute for it in the various forms of hypothecation.³⁸

§ 305. Material alterations. It is scarcely necessary to state that any material alteration in the recitals of the mortgage, without the consent of both parties, will have the effect of annulling the instrument. This principle permeates the entire scheme of our municipal law so far as regards any written instrument. There is no necessity for stating that a document once solemnly attested, and formally delivered, is incapable of alteration at the mere whim or caprice of any one of the parties.³⁹ It is needless to pursue this topic further, as it has long been a matter of settled law.⁴⁰

§ 306. Reformation of mortgages. Discussion of this topic is reserved for our subsequent chapter on Deeds, where will also be found some pertinent remarks upon the subject of cancellation.

§ 307. Execution, delivery, acceptance and recording. These several topics also form extended ground for inquiry

³⁸ *Ackerman v. Hunsicker*, 85 N. Y. 43; *Hubbard v. Savage*, 8 Conn. 215; *Collier v. Falk*, 69 Ala. 58; *Hook v. Creamer*, 34 N. J. Eq. 181; *Berry v. O'Conner*, 33 Minn. 29; *Nelson v. Boyce*, 7 Marsh, 401; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Collins v. Castile*, 13 Me. 254; *Mix v. Coles*, 20 Conn. 420.

³⁹ *Brown v. Straw*, 6 Neb. 537; *Hunt v. Gray*, 35 N. J. L. 227; *Trigg v. Taylor*, 27 Mo. 245; *Stewart v. Preston*, 1 Fla. 10; *Lee v. Alexander*, 9 B. Mon. 25; *Greenfield Sav. Bk. v. Stowell*, 123 Mass. 196.

⁴⁰ See 2 Rice, Evidence, 850-9.

and critical investigation in the chapter on Deeds. And considerations of space alone make it undesirable to duplicate any discussion beyond the absolute necessities of the case.

§ 308. Rights of mortgagee in possession. A mortgagee in possession is under a duty to use the premises and property like an ordinary, prudent owner. He is bound to make necessary repairs. He cannot improve the owner out of his equity, nor can he unnecessarily, when the security is ample, encroach upon the body of the property pledged. He is bound to derive a reasonable income from the use of the property, and apply it first to keeping the interest extinguished, and the surplus to the extinguishment of the principal. He can legally no more commit waste than can the mortgagor. He is chargeable for loss incurred by his willful default. He is not entitled to receive anything for his own personal services.⁴¹ He must account for waste committed by him while in possession.⁴²

§ 309. Liability of the grantee of mortgaged premises. There can be no quarrel with the proposition that the mere conveyance of land, subject to a mortgage lien, does not create a personal liability on the part of the grantee in the absence of some express assumption of the payment. In

⁴¹ Pom. Eq. Jur., secs. 1215-1217, and notes; Barnett v. Nelson, 54 Ia. 41, 37 Am. Rep. 183; Sanders v. Wilson, 34 Vt. 318; French v. Baron, 2 Atk. 120; Moore v. Cable, 1 Johns. Ch. 385, 1 L. ed. 780, and note; Benedict v. Gilman, 4 Paige, 58, 3 L. ed. 340, and note; Currier v. Webster, 45 N. H. 226; 2 Jones, Mortg. secs. 1123, 1125.

⁴² It is well settled that if the mortgagee can obtain possession of the mortgaged premises peaceably he will not be dispossessed until his entire claim is liquidated. (Tallman v. Ely, 6 Wis. 244; Den v. Wright, 7 N. J. L. 175; Pace v. Chadderdon, 4 Minn. 499; Bussey

v. Paige, 14 Me. 132; Hubbell v. Moulson, 53 N. Y. 225; Harris v. Haines, 34 Vt. 220.) He may make such repairs as are reasonably necessary for the due preservation of the estate, but will not be allowed to charge for such repairs as are merely for his own convenience, especially if such repairs are in the nature of permanent improvements, any other rule would make it more difficult for the mortgagor to redeem the property. (Raynor v. Drew, 72 Cal. 307; Quinn v. Britian, Hoff Ch. (N.Y.) 353; 3 Pom. Eq. Jur. 205; Johnson v. Hosford, 110 Ind. 578.)

such instances the mortgagee may, of course, resort to the property mortgaged, but on sale of the premises for a less sum than the face of the mortgage (with interest and costs added), he is without claim against the grantee for any part of the deficiency. The debt follows the land only to the extent of the value of the land, and the result is that any person is at liberty to purchase the mortgaged premises without becoming personally responsible for any part of the claim against the property, provided appropriate expressions appear in the conveyance which evidence the intention to exempt him from liability.⁴³ Such a conveyance leaves the grantor principally liable for a deficiency.⁴⁴

§ 310. Junior encumbrancers and the principle of subrogation.

A junior encumbrancer is entitled to redeem a prior mortgage. And the redeeming party, who is not himself liable as a principal debtor, but who is compelled to redeem for the protection of his own lien upon the mortgaged premises, is entitled to subrogation to the rights of the senior mortgagee.⁴⁵

After tendering to a senior mortgagee the amount due, and demanding an assignment of the senior mortgage, a junior mortgagee may, by bill in equity, compel such assignment.⁴⁶

One who has a junior lien by mortgage or judgment is entitled, upon paying the prior mortgage, to be subrogated to the right of the mortgagee, without any assignment.⁴⁷

When a man pays a debt which could not properly be called his own, but which it was his interest to pay, the law subrogates him to all the rights of the creditor.⁴⁸

⁴³ Belmont v. Coman, 28 N. Y. 438.

⁴⁴ Brusse v. Paige, 1 Keyes, 87; Tillotson v. Boyd, 4 Sandf. 516; Munnay v. Smith, 1 Duer. 412.

⁴⁵ Jenkins v. Continental Ins. Co. 12 How. Pr. (N. Y.) 66; Dauchy v. Bennett, 7 How. Pr. (N. Y.) 375; Russell v. Howard, 2 McLean, 489.

⁴⁶ Pardee v. Van Auken, 3 Barb. 534; Fell v. Brown, 2 Bro. C. C. 276; Stonehewer v. Thompson, 2 Atk. 440; 3 P. Wms. 331; 4 Kent's

Com. 162, marg. page; 2 Story Eq. Jur., sec. 1023; Willard Eq. Jur. 447; Burnet v. Dennison, 5 Johns. Ch. 35; Rosevelt v. Bank of Niagara, Hopk. 579; Averill v. Taylor, 4 Seld. 44.

⁴⁷ Ellsworth v. Lockwood, 42 N. Y. 89; Cowley v. Shelby, 71 Ala. 122; Bacon v. Goodnow, 59 N. H. 415; Lucking v. Wesson, 25 Mich. 443.

⁴⁸ 2 Bouvier, Law. Dict. 417.

No contract is necessary upon which to base the right, for it is founded upon principles of equity and benevolence, and may be decreed where no contract exists."

a. *Volunteers cannot invoke the doctrine.* Sheldon, in his work on Subrogation, sec. 240, says: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own."⁴⁹

"A stranger or volunteer, as those terms are used with reference to the subject of subrogation, is one who, in no event resulting from the existing state of affairs, can become

⁴⁹ Cottrell's Appeal, 23 Pa. St. 294; Mosier's App., 56 Pa. 80, 93 Am. Dec. 783; McCormick v. Irwin, 35 Pa. 117; Iron City Tool Works v. Long, 44 Phila. Leg. Int. 28; Snelling v. McIntyre, 6 Abb. N. C. 469; Sidener v. Pavey, 77 Ind. 241; Bright v. Boyd, 1 Story C. C. 478; Everston v. Central Bank of Kansas, 33 Kan. 352; Hammond v. Barker, 61 N. H. 53; Payne v. Hathaway, 3 Vt. 212; Gans v. Thieme, 93 N. Y. 225; Dixon, Subrogation, p. 165; Bolman v. Lohman, 74 Ala. 507; Twombly v. Cassidy, 82 N. Y. 155; 1 Jones, Mortg., sec. 874, C; Milholland v. Tiffany, 64 Md. 455; Keener, Quasi Cont. 388; Graff's Estate, 139 Pa. 76; Cottrell's App., 23 Pa. 294; 2 Beach, Modern Eq. Jur. 869; People's Nat. Bank of Charleston v. Epstin, 44 Fed. Rep. 404; Wallace's Estate, 59 Pa. 405; Hoover v. Epler, 52 Pa. 524; Blackburn Bldg. Soc. v. Cunliffe, L. R. 22 Ch. Div. 61; Wenlock v. River Dee Co., L. R. 19 Q. B. Div. 155; Maurer's App. 86 Pa. 380.

⁵⁰ Iowa Homestead Co. v. Des

Moines Nav. & R. Co. 84 U. S., 17 Wall. 153, 21 L. ed. 622; Langley v. Chapin, 134 Mass. 82; Moody v. Moody, 68 Me. 155; Allegheny Valley R. Co. v. Dickey, 131 Pa. 93; Parker's App., 8 Watts. & S. 449; Forest Oil Co.'s App., 118 Pa. 145; McCleary's App., 20 W. N. C. 547; Downer v. Wilson, 33 Vt. 1; Wilson v. Soper, 44 Me. 118; Re North River Constr. Co. 38 N. J. Eq. 433; Woods v. Gilson, 17 Ill. 218; Wolff v. Walter, 56 Mo. 292; Cockrum v. West, 122 Ind. 372; Gerdine v. Menage, 41 Minn. 417; Oury v. Saunders, 77 Tex. 278; Dutcher v. Hobby, 10 L. R. A. 472, 86 Ga. 198; Lockwood v. Marsh, 3 Nev. 138; Clark v. Clark, 58 Miss. 68; Emigrant Industrial Sav. Bank v. Clute, 33 Hun, 82; Bolman v. Lohman, 74 Ala. 507; Everston v. Central Bank of Kansas, 33 Kan. 352; Gilbert v. Gilbert, 39 Iowa, 657; Chaffe v. Oliver, 39 Ark. 531; Levy v. Martin, 48 Wis. 198; Flannery v. Utley (Ky.), Dec. 6, 1887; Fry v. Hamner, 50 Ala. 52; Ætna L. Ins. Co. v. Buck, 108 Ind. 174.

liable for the debt, and whose property is not charged with the payment thereof and cannot be sold therefor."

§ 311. **Merger and its incidents.** Merger is that operation of law which extinguishes a right by reason of its coinciding with another right of greater legal worth, in the same person. By "operation of law" is meant that it may take place independently of the wishes of, or the intention of the parties; and by "greater legal worth" is meant that one right in estimation of law, though not necessarily in fact, is of higher value than the other.⁵¹ The whole title, legal as well as equitable, must unite in one and the same person before there can be a "merger."⁵²

It is sometimes said that this principle of merger is not favored by courts of equity and that the estates will be kept separate whenever the interests of the parties so require.⁵³ Undoubtedly this last half of the proposition is true, but the shallow dogmatism of the first half must be quite apparent. It affords one of many instances where the chronic habit of our text writers to perpetuate from age to age some hoary fable about real estate, results in the exposé of a pure piece of idiocy. A court of equity has no special antagonism to the principles of merger. True, it will restrain its operation where fraud or injustice spring from such a result, but it will restrain the operation of the Statute of Frauds for the same reason, and yet we have never heard that these courts were specially given to antagonizing those celebrated statutes. In multitudes of cases the courts of equity will deny the operation of some well settled legal principle, but always in the furtherance of justice and to repel oppression.⁵⁴

a. *Rule where intention is not expressed.* If there is no expression of the intention at the time, then all the circum-

⁵¹ Rapalje and Lawrence Law Dict. title "Merger."

⁵² Jordan v. Cheeney, 74 Me. 362.

⁵³ Smith v. Roberts, 91 N. Y. 475; Gibson v. Crehore, 3 Pick. 475.

⁵⁴ Sherwood v. Collier, 3 Dev. L. 380; Birke v. Abbott, 103 Ind. 1; Patterson v. Mills, 69 Ia. 755;

Gresham v. Ware, 79 Ala. 192;

Lowman v. Lowman, 118 Ill. 682;

Lovrein v. Humboldt Safe Deposit

Co. 113 Pa. St. 6; Carpenter v.

Gleason, 58 Vt. 244; Finch v.

Houghton, 19 Wis. 149; Duncan v.

Smith, 31 N. J. L. 335; Fowler v.

Fay, 62 Ill. 375; Polk v. Reynolds,

31 Md. 106; Davis v. Pierce, 19

stances will be considered in order to discover what is for the best interests of the party. He will be presumed to have intended that the charge should be kept alive or should merge according to the benefit resulting from either. If a merger would let in other encumbrances which he was not already bound to pay, this is a circumstance almost decisive of an intention not to permit a merger.⁵⁵

If, after the ownership and the charge have become united, the party does any act which clearly shows that he regards the incumbrance as still subsisting, this is a strong, even if not conclusive, evidence of an intent that there should be no merger;⁵⁶ as, for example, if he transfers the mortgage and bequeaths the incumbrance in specific terms,⁵⁷ or devises the land subject to the charge.⁵⁸ A devise of the land without mentioning the incumbrances, is some evidence of an intention that it should merge.⁵⁹

Extinguishment and merger differ. Merger is only a mode of extinguishment, and applies to estates only under particular circumstances.

§ 312. Assignment of mortgages. The usual mode of effecting the assignment, especially since the very general introduction of the recording act, is by instrument in writing. But the assignment may be by parol, although a very unsatisfactory method in any view of the case of *Kiff v. Weaver*, 94 N. C. 274. And it has been held that the mere delivery of the mortgaged security is a sufficient assignment of whatever interests the mortgagee may have.⁶⁰ However, the assign-

Minn. 376; *Rumpp v. Gerkens*, 59 Cal. 496; *Pennock v. Eagles*, 102 Pa. St. 290; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Mallory v. Hitchcock*, 29 Conn. 127; *Freeman v. Paul*, 3 Me. 260; *Knowles v. Carpenter*, 8 R. I. 548.

⁵⁵ *Swinfer v. Swinfer*, 29 Beav. 199; *Davis v. Barrett*, 14 Id. 542; *Hatch v. Skelton*, 20 Id. 453; *Clarendon v. Barham*, 1 Younge & C. 688.

⁵⁶ *Powell v. Smith*, 30 Mich. 451.

⁵⁷ *Blundell v. Stanley*, 3 DeG. & S. 433; and see *Wilkes v. Collins*, L. R. 8 Eq. 338.

⁵⁸ *Hatch v. Skelton*, 20 Beav. 453; but see for a limitation, *Johnson v. Webster*, 4 DeG. & G. 474; *Astley v. Milles*, 1 Sim. 298.

⁵⁹ *Swinfer v. Swinfer*, *supra*. See generally on this subject *Pomeroy*, Eq. Jur. 729; 1 *Rice*, Evidence, 289.

⁶⁰ *Fryer v. Rockefeller*, 63 N. Y. 276.

ment may be effected, one result is always prominent — the assignee can only claim what is really due, and his interest is subject to the superior equities of the mortgagor. Any right which might have been enforced against the assignor is equally available as against the assignee. He occupies the same position, and, as a purchaser of a chose in action, he must abide by the case of the person from whom he buys.⁶¹

The assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but also to all equities which third persons could enforce against the assignor.⁶²

§ 313. **The equity of redemption and its incidents.** The humane and beneficent principles now embodied in the term equity of redemption did not obtain their ascendancy without a desperate struggle on the part of the common law judges who could never refrain from declaring a forfeiture absolute, whenever the amount due was not paid on the day specified. Their animosity was further inflamed by the strenuous opposition of the English chancellors who steadily refused to sanction the harsh and repulsive features of a common law forfeiture, and insisted upon a more liberalizing policy. The result was that for a considerable period the English decisions presented a series of contradictions, and involved the entire topic in great confusion and uncertainty. The common law courts recognized the mortgagee's interest as absolute immediately on failure to pay, and acting on this theory placed him in possession. The equity jurisdiction as promptly, acting on the *contra* theory, threw him out of possession, and this was followed by a desperate wrangle in the courts which usually resulted in the triumph of the chancery proceeding, and finally led to the abandonment of the common law view.

⁶¹ Woodruff v. Morristown Inst., 34 N. J. Eq. 174; Bush v. Lathrop, 22 N. Y. 535; Tabor v. Fay, 56 Iowa, 539.

⁶² Bush v. Lathrop, 22 N. Y. 535; Schafer v. Reilly, 50 Id. 61; Union College v. Wheeler, 61

Id. 88; Greene v. Warnick, 64 Id. 220; Crane v. Turner, 67 Id. 437; Westbrook v. Gleason, 79 Id. 23; Temple v. Whittier, 5 West. Rep. 144, 117 Ill. 282; Ranney v. Hardy, 1 West. Rep. 52, 43 Ohio St. 157.

"The right of redemption, which is the true *indicium* of a mortgage, remains in the mortgagor and his representatives, until it shall be foreclosed by entry or judgment, with possession as described by law, or until, availing himself of his power, the mortgagee shall have made a conveyance pursuant to it to some one who shall intend to purchase an irredeemable estate."⁶³

The statutory right of redemption after a sale under a decree of foreclosure is a rule of property in most of the States, and must be fully recognized in all instances.⁶⁴

§ 314. Extinguishment or discharge. While it is a rule fully sustained by the authorities that nothing short of full payment is sufficient to discharge the mortgage debt, it is also true that circumstances may be of such a character as to import full payment, although the actual money has not been passed. Thus, the voluntary satisfaction of a mortgage, and the taking of a note signed by a third party, would be construed into the relinquishment of a mortgage lien.⁶⁵ And if the mortgage lien is shown to have been cancelled, it cannot be revived by any mere agreement of the original parties to the prejudice of a judgment creditor whose lien has been docketed since the mortgage was discharged.⁶⁶ As to the method of applying the various payments the rule is this: In the absence of any specific instructions on the subject, the creditor is at liberty to at first satisfy such claims as he may hold against the debtor that are not secured, and any balance remaining should be then applied in extinguishment of the mortgage lien.⁶⁷

Statutory provision exists in all the States by which the lien of a mortgage, so far as its record is concerned, may be

⁶³ Eaton v. Whiting, 3 Pick. (Mass.) 484.

⁶⁴ Brine v. Hartford F. Ins. Co. 91 U. S. 627 (24: 858); Swift v. Smith, 102 U. S. 442 (26: 193); Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51 (27: 648); Burley v. Flint, 105 U. S. 247 (26: 986); Shillaber v. Robinson, 97 U. S. 68 (24: 967); Russell v. Southard, 53 U. S. (12 How.), 139 (13:

927); Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47 (27: 47); Peugh v. Davis, 96 U. S. 332 (24: 775); Orviss v. Powell, 98 U. S. 176 (25: 238).

⁶⁵ Mattix v. Weand, 19 Ind. 151.

⁶⁶ Boyd v. Parker, 43 Md. 182.

⁶⁷ Knox v. Johnson, 26 Wis. 41; Niagara Bank v. Rosevelt, 9 Cow. (N. Y.) 409.

legally discharged. The almost universal method is for the mortgagee to sign a certificate with all the formalities of an original mortgage, which, in effect, directs the clerk or registrar of deeds to notice, in the proper way, the discharge of the mortgage upon the record. This is regarded as notice to all the world that the creditor no longer depends upon the mortgaged premises as a security for his claim. This discharge is frequently called a "satisfaction piece," and is a valid conveyance under the recording acts, as it obviously affects the title to real property.⁶⁸ There is still another method of releasing the lien, and that is by a quit-claim deed from the mortgagee (as grantor), to the owner of the equity of redemption as grantee. This method is frequently resorted to when for any reason it seems desirable to release a part of the mortgaged premises.⁶⁹ The case last cited decides what should be good law everywhere, that a formal endorsement on the back of the mortgage, if sufficiently explicit, should have the same result. But the difficulty in such a case is at the registry office. Such a "satisfaction piece" is not a sufficient compliance with the statute to entitle it to the privilege of recording.

A mortgage, registered or recorded, must be discharged upon the record, by the recording officer, when there is presented to him a certificate signed by the mortgagee, his personal representative or assignee, and acknowledged or proved, and certified, in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge, and the certificates of its acknowledgment or proof, must be recorded; and a reference must be made to the book and page containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record.

§ 315. Foreclosure and its incidents. *a. Preliminary note.* It is entirely foreign to the nature and scope of this present undertaking to indicate mere practice methods relating to the

⁶⁸ Bacon v. Van Schoonhoven, 19 607; Woodbury v. Aikain, 13 Ill, Hun (N.Y.), 158. 629; Waters v. Waters, 20 Ia. 363.

⁶⁹ See Mason v. Beach, 55 Wis.

procedure by which a competent tribunal seeks to enforce the mortgagee's equities by means of a foreclosure decree. This procedure is minutely indicated in innumerable special works on practice methods.

b. *The term foreclosure defined.* Foreclosure is the remedy pursued by the mortgagor to enforce the payment of the sum due him from the mortgage and has been defined by a well known legal writer as "the process by which the mortgagee acquires or transfers to a purchaser, an absolute title to the property of which he has previously been only a conditional owner, or upon which he has previously had a lien or incumbrance."⁷⁰ All that the process really achieves is the extinguishment of a right — that of equity of redemption — and the creation of an estate in another person than the mortgagor.⁷¹ The process has some analogies in the Justinian Code and has been co-ordinate in development with the law of mortgages. There are four methods of effecting this result now in vogue in this country, viz: 1, By equitable action; 2, By entry and possession; 3, By advertisement; and, 4, By process without sale or "strict foreclosure." This last is a harsh and repellant remedy, seldom resorted to, while statutory foreclosure is in bad repute owing to the numerous and exasperating technicalities that infest the practice, in fact, equitable foreclosure is by far the most popular and effective method, and is all but universal; even the proceeding known in the New England States as entry and possession, is largely dependent upon the application of equitable rules, but as it requires in most instances three years to perfect a title, I should unhesitatingly condemn the system as unworthy of imitation.

Two objects are sought to be accomplished in foreclosures on the sale of the mortgaged property by decree — one to give perfect title and apply the moneys arising from the sale upon the mortgage debt; the other, in case of deficiency, to obtain a personal judgment against the parties liable therefor.⁷² A court of equity has, it is said, inherent power to

⁷⁰ 2 Hilliard (Mort.), 1; Goodman v. White, 26 Conn. 317.

⁷¹ Martin v. Pond, 30 Fed. Rep. 18; Duncan v. Cobb, 32 Minn. 464.

⁷² Wiltsie, Mort. Forec. 5.

order a sale of the mortgaged premises for the debt independent of any statute.⁷³

c. *Largely regulated by statute.* In most of the States statutes have been enacted for the regulation of mortgage foreclosures, giving power to the court, not only to direct the sale of the mortgaged premises and to compel the delivery of the possession thereof to the purchaser, but also to adjust payment by the mortgagor or by any other person liable for the debt of any deficiency that might remain unsatisfied after the sale of the mortgaged premises, and, as in other actions, to issue the necessary execution upon such judgment of deficiency.⁷⁴ Without statutory authority such an execution could not be issued in a foreclosure against the property of the mortgagor or other person liable for the deficiency remaining unsatisfied after the application of the proceeds of the sale to the payment of the mortgage debt.⁷⁵

d. *The rule lis pendens.* Statutory regulations universally require the plaintiff, in any action affecting real property, such as ejectment, foreclosure, partition and the like, to file at the time of the commencement of his suit a notice of the pendency of action. This is, in substance, a brief recital of the nature and scope of the relief demanded together with a description of the real property affected by the action. Provision is made for its due record in a book kept specifically for the purpose, and every abstract of title should contain some evidence that search has been made for notices of this character. Parties are thus charged with notice that the property is in litigation, and any purchase made by them is subject to whatever decree is rendered in the action.⁷⁶

⁷³ *Lansing v. Goelet*, 9 Cow. 346; *Mills v. Dennis*, 3 Johns. Ch. 367.

⁷⁴ N. Y. Code Civ. Proc. sec. 1627.

⁷⁵ *Stark v. Mercer*, 4 Miss. (3 How.), 377, (1839); *Wiltsie on Mortgage Foreclosures*, p. 722.

⁷⁶ *Primary object of rule.*—It should always be borne in mind that the primary object, it might almost be said the sole object to be obtained by the rule *lis pendens*, is to make

it possible for the courts to execute their judgments and decrees. As is well said in the leading case of *Newman v. Chapman*, 2 Rand. 93: "It is founded upon the necessity of such a rule, in order to give effect to the proceedings in courts of justice. Without it the administration of justice might in all cases be frustrated by successive alienations of the property which was the subject of litigation, pending the

e. *The final decree of sale.* The plaintiff, having duly procured the judgment of foreclosure and sale, and entered the same, is entitled to proceed to have the mortgaged premises sold for the payment of his debt. A sale under such a decree is, in contemplation of the law, the act of the court, although it may be made through the instrumentality of some officer designated by statute, or appointed by the court. When the sale is confirmed, it becomes the act of the court, or, in other words, is a judicial sale; but until such confirmation there is no judicial sale, and no title passes to the purchaser.⁷⁷ In New York, however, confirmation of the referee's report of sale is not necessary to pass title.

The sale may be made by a master in chancery, a referee, trustee, commissioner or sheriff; and in the federal courts it is usually made by a United States marshal, or by a referee specially appointed for that purpose.⁷⁸ Whatever name may be given to the officer who makes the sale, he acts as the agent of the court, and must report his proceeding in the execution of its decrees. And it has been said that the sheriff, or other officer to whom the decree of sale is committed, may conduct the sale, though his term of office will expire before the sale can be completed.⁷⁹

f. *Doctrine of relation.* Under a decree of foreclosure, the

suit, so that every judgment and decree could be rendered abortive, where the recovery of specific property was the object.

The necessity of the rule is inexorable, tempered by little or no consideration of conscience, because a relaxation of the rule, to avoid harsh applications in special cases, would defeat the object of the rule itself. Within certain limits, its enforcement is as imperative as the demands of military necessity. The very existence and perpetuation of the courts depends upon its enforcement. (Bennett v. Lis Pendens, 14.)

The history and principles of the general doctrine of *lis pendens* are

fully set forth by Chancellor Kent, in *Murray v. Balou*, 1 Johns. Ch. (N. Y.), 566; and in *Murray v. Lylburn*, 2 Johns. Ch. N. Y., 441. The whole law on the subject, it has been said, may be found in these two cases, subsequent cases having merely exemplified and applied the law as there expounded by the learned chancellor. See *Leitch v. Wells*, 48 N. Y. 585; *Wiltzie on Mortgage Foreclosures*, p. 365.

⁷⁷ *Thorn v. Ingram*, 25 Ark. 52 (1867).

⁷⁸ *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.), 154, (1816).

⁷⁹ *Union Dime Savings Inst. v. Andariese*, 19 Hun (N. Y.), 310, (1879).

title of the purchaser takes effect by "relation" to the date of the mortgage, and supersedes any subsequent lien.⁸⁰ This doctrine of "relation" is a legal fiction resorted to by equity courts to prevent a frustration of justice. By this method an act done at one time is regarded as done at some other time, *nunc pro tunc*, as it were. The further design is to protect parties deriving their interest from the claimant, pending proceedings for the confirmation of his title. Effect is given to the confirmation as of the day when the proceedings were instituted.⁸¹

g. *Redemption rights.* Eighteen States have followed New York in refusing to the mortgagor any redemption rights whatever after sale on foreclosure. That event is looked upon as a finality in so far as regards the debtor's interest in the property. But in many other States a contrary rule obtains, whereby for a period ranging all the way from four months in Oregon to three years in Massachusetts the right of redemption is allowed.

h. *Rule as to surplus money.* If there is surplus money remaining after payment of the amount due on the mortgage lien or incumbrance, with interest and costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.⁸²

⁸⁰ *Osterberg v. Union Trust Co.*
93 U. S. 428.

⁸² N. Y. Code Civ. Pro. sec. 1633;
Cal. Code Civ. Pro. sec. 727.

⁸¹ *Lynch v. Bernal*, 9 Wall. 325;
Adiar v. Mergentheim, 114 Ind. 305.

CHAPTER XXI.

MECHANICS' LIENS.

SEC. 316. Preliminary note; nature and object.

317. Such liens are the creation of statute; unknown to the common law; liberally construed.

318. Rule as to filing.

319. Cannot be assigned except when.

320. Extent of the lien.

321. Rule as to priority of encumbrances.

322. When lien attaches.

323. The remedy.

324. Construction of similar statutes.

§ 316. **Preliminary—nature and object.** Legislation upon the subject of mechanic's liens has been both profuse and variant, and it is utterly impracticable in a work of this character, to attempt anything like a symmetrical co-ordination of the innumerable enactments that have found their way into print. The policy of the entire system has been seriously questioned, and doubts have frequently been expressed as to whether, upon the whole, it has been for the advantage of those for whom it was enacted, but the better view regards the doctrine as resting upon the broad foundation of natural equity and commercial necessity. Nothing is more reasonable than that an artificer or business man should have a qualified property in the thing upon which he has bestowed time and labor, or with which he has incorporated his materials.¹

"The whole design of this statute is to render the proceeding on the part of the mechanic or materialman, in imposing and enforcing his lien, as simple as possible, and connected with as little detail as may be consistent with the due protection of the rights of the owner, or of other parties whose interests may be affected by the incumbrance created."²

¹ Mochon v. Sullivan, 1 Mont. 470. ² Paine v. Bonney, 4 E. D. S. (N.Y.) 734.

Mechanics' lien may be briefly described as a species of security. It is a right by which a person is entitled to obtain satisfaction of a debt by means of property belonging to the person indebted to him, and it attaches to property that is, or has been, the subject of a transaction between the parties. They arise either by operation of law or by agreement between the parties.

It is the special province of the equitable jurisdiction to liberally treat any interest in the nature of a lien. The court will proceed upon the theory that in strictness the lien is not a "*jus in re*" or a "*jus ad rem*;" that is neither a property in the thing itself, nor a right of action for the thing. It is rather a charge upon the thing; a right to possess and retain the property, until some charge attaching to it is paid or discharged.³

§ 317. Such liens are the creation of statute — Unknown to the common law. The lien of mechanics and materialmen on buildings and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the "creation of statute," and was unknown either at common law or in equity.⁴

Statutes governing mechanics' liens are remedial, and must be liberally construed.⁵

This proceeding is wholly statutory, and, to entitle a claimant to its benefits, the recitals of the enactment must be closely observed; any substantial failure in this respect will avoid the lien and the court has no authority or power to sustain the proceeding, as a compliance with the requirements of the statute is necessary to confer jurisdiction, and when that is omitted in any essential particular, the benefit designed by the statute cannot be obtained.⁶

Liens of this character are in fact statutory mortgages.⁷

³ 1 Story, Eq. Jur., sec. 506.

⁴ Phillips, Mechanics' Liens, sec. 1, citing Davis v. Farr, 13 Pa. 167; McNeil v. Borland, 23 Cal. 144; Dooliner v. Rogers, 16 Mo. 340; Ayers v. Revere, 25 N. J. L. 474; Spencer v. Barnett, 35 N. Y. 94; South Fork Canal Co. v. Gordon,

73 U. S., 6 Wall. 561; 18 L. ed. 84; McCoy v. Quick, 30 Wis. 521.

⁵ Rogers v. Omaha Hotel Co. 4 Neb. 59.

⁶ Brown v. New York, 6 Thomp. & C. 164; Van Loon v. Lyons, 61 N. Y. 22; Burrows v. Ford, 6 Id. 176; People v. Knowles, 47 Id. 415.

⁷ Marion v. Skillman, 127 Ind. 130.

§ 318. **Filing.** These liens may be filed and become an absolute lien to the full and fair value of all such work and materials to the extent of the right, title and interest then existing of the owner of said premises, in favor of every person or persons who shall be employed by any owner, contractor, sub-contractor, jobber or master workman in manner aforesaid.

§ 319. **Cannot be assigned except when.** The lien under statute of this character is, in general, a personal right given to the mechanic, materialman and laborer, for his own protection, and the right to create it cannot be assigned or transferred to another,⁸ unless the assignment is made for the benefit of the assignor, and to be held as his agent, so that the lien may be preserved.⁹

§ 320. **Extent of the lien.** Mechanics may acquire a lien upon the interest of the owner of real property to the extent of the value of the labor done or of the materials furnished, and the liens are not defeated by the fact that the owner before the filing of the liens has paid the contractor in full. It is his duty to know that the contractor has fully indemnified the laborers and materialmen, before he settles with him, otherwise gross injustice may be done to those who have entitled themselves to remuneration.¹⁰

§ 321. **Rule as to priority of encumbrances.** The priority as between mechanics' liens and mortgages is largely controlled by statutory enactment in the different States.¹¹

⁸ Daubigny v. Duval, 5 T. R. 604; Caldwell v. Lawrence, 10 Wis. 332; Pearsons v. Tincker, 36 Me. 384.

⁹ Urquhart v. McIvers, 4 Johns. 102; McComble v. Davies, 7 East, 5. See note to Farmers' Loan & T. Co. v. Canada & St. L. R. Co. (Ind.), 11 L. R. A. 740.

¹⁰ Andis v. Davis, 63 Ind. 17; Clough v. McDonald, 18 Kan. 114; Attwood v. Williams, 40 Me. 409; Treusch v. Shyrock, 51 Md. 162; Laird v. Moonan, 32 Minn.

358; White v. Miller, 18 Pa. 52; Lonkey v. Cook, 15 Nev. 58.

¹¹ Cheshire Provident Inst. v. Stone, 52 N. H. 365; Chadbourn v. Williams, 71 N. C. 450; Brooks v. Burlington & S. W. R. Co., 101 U. S. 443, 25 L. ed. 1057; Cal. Code Civ. Proc. sec. 1186; Shepardson v. Johnson, 60 Iowa, 239; Mass. Gen. Stat., chap. 150; Mellor v. Valentine, 3 Colo. 258; Davis v. Bilsland, 85 U. S. 18 Wall. 659, 21 L. ed. 969.

The first mortgage given in good faith and duly recorded is prior, superior and paramount to a mechanics' lien subsequently filed.¹² It is the law of Ohio that a mortgage takes effect from the date it is filed for record, and this fact controls its priority.¹³

If the premises are already incumbered by a mortgage to a *bona fide* incumbrancer, the claim of the mechanic is subordinate to that of the mortgagee; and this is a well recognized law governing the subject.¹⁴

The Supreme Court of Minnesota, in the case of *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, held the statute of the State, in so far as it assumes to give a mechanics' lien precedence over prior incumbrances, to be unconstitutional and void. The reasoning of the court in this opinion is to the effect that such an act impairs the obligation of contracts, and divests settled right of property.

§ 322. When lien attaches. The lien generally attaches from the commencement of the work or the furnishing of materials, and continues for a limited period of time. In some States, a claim must be filed in the office of the clerk or prothonotary of the court, or a suit brought within a limited time. On the sale of the building these liens are to be paid *pro rata*. In some States no lien is created unless the work done or the goods furnished amount to a certain specified sum, while in others there is no limit to the amount. In general, none but the original contractors can claim under the law; sometimes, however, sub-contractors have the same right.¹⁵

§ 323. The remedy. The remedy is various; in some States, it is by *scire facias* on the lien, in others it is by petition to the court for an order of sale; in some the property is subject to foreclosure, as on a mortgage; in others, by a common action.¹⁶

¹² *Coe v. New Jersey M. R. Co.* 31 N. J. Eq. 127, 128; *West v. Klotz*, 37 Ohio St. 420; 2 *Wood, Railway Law*, 292; *Choteau v. Thompson*, 2 Ohio St. 114.

¹³ *King v. Ballentine*, 40 Ohio St.

391; *Bloom v. Noggle*, 4 Ohio St. 52; *Bercaw v. Cockerill*, 20 Ohio St. 163.

¹⁴ *Munger v. Curtis*, 42 Hun, 465.

¹⁵ 2 *Bouv. Law Dict.* 48.

¹⁶ See 1 *Hill, Ab. ch.* 40, p. 354; 2 *Bouv. Law Dict.* 48.

§ 324. **Construction of similar statutes.** When a particular statute has been adopted in a State from the statutes of another, after a judicial construction has been given it in such last mentioned State, it is but just to regard the construction as having been adopted as well as the words.¹⁷

The same rule has been recognized by the Supreme Court of the United States.¹⁸ And this, although the examining court finds that upon similar language, in a statute within their own sovereignty, they would place a different, or even reverse construction.¹⁹

¹⁷ Bond v. Appleton, 8 Mass. 472, 5 Am. Dec. 111; Rutland v. Mandon, 1 Pick. 154; Com. v. Hartnett, 3 Gray, 450; Waterford & W. Turnp. Co. v. People, 9 Barb. 167; Campbell v. Quinlin, 4 Ill. 288; Little v. Smith, 5 Id. 400; Fisher v. Deering, 60 Id. 114; Langdon v. Applegate, 5 Ind. 327; Fall v. Hazelrigg, 45 Id. 576, 15 Am. Rep. 278; Ingraham v. Regan, 23 Miss. 213; Adams v. Field, 21 Vt. 256; Drennan v. People, 10 Mich. 169; Harrison v. Sager, 27 Id. 476; Pangborn v. Westlake, 36 Ia. 546; Poertner v. Russell, 33 Wis. 193; Myrick v. Hasey, 27 Me. 9, 46 Am. Dec. 583; People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Bemis v.

Becker, 1 Kan. 226; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Hess v. Pegg, 7 Nev. 23; Freese v. Tripp, 70 Ill. 496; Ex parte Matthews, 52 Ala. 51; Bradbury v. Davis, 5 Colo. 265.

¹⁸ Walker v. Marks, 84 U. S. (17 Wall.), 648, 21 L. ed. 744; Bailey v. Magwire, 89 U. S. (22 Wall.), 215, 22 L. ed. 850; Galpin v. Page, 85 U. S. (18 Wall.), 350, 21 L. ed. 959; Secombe v. Milwaukee & St. P. R. Co. 90 U. S. (23 Wall.), 108, 23 L. ed. 67; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795.

¹⁹ Consult, generally, Phillips on Mechanics' Liens.

CHAPTER XXII.

TITLE BY DESCENT.

- SEC. 325. Definition and nature.
326. Object of the statutes of distributions.
327. Local laws govern the descent of real property.
328. Who may inherit — views of Professor Walker.
329. Can a patricide inherit — an extreme case cited.
330. Rule as to bastards.
 a. Review of the celebrated Miller case.
331. Legal status of an adopted child.
332. Advancements.
 a. How adjusted.

§ 325. **Definition and nature.** *Descent.* This is the title by which a man, on the death of his ancestor succeeds to his rights of property, as his heir-at-law. It is, in effect, nothing more than the doctrine of hereditary succession. As previously remarked, there are but two methods of acquiring property now in vogue — descent and purchase. The first is the method we are discussing, and the second embraces every conceivable mode of acquiring property except by descent. In title by descent, the heir has the inheritance cast upon him, *nolens volens*, immediately upon the death of the ancestor. The law in this instance operates in an arbitrary and compulsory way, and suicide is the only relief open to the heir by which he can avoid this pitiless law of inheritance.¹ Descent of real property in this country is regulated almost entirely by statutory provisions.

§ 326. **The objects of the Statutes of Distributions.** In *Edwards v. Freeman*, 2 P. Wms. 442, Lord Raymond says:

¹ The Louisiana cases hold that the heir may formally *renounce* his inheritance.

The doctrine of "descent cast" has been abrogated by the statutes

of many of the States, and by the statute now in force in England. (Tyler on Ejectment and adverse enjoyment, 87.)

“The Statute of Distributions makes such a will for the intestate as a father, free from the partiality of affections, would himself make; and this I call a parliamentary will.” So, in *Garland v. Harrison*, 8 Leigh. (Va.), 368, Parker, J., said, in regard to the Virginia Statute of Descents, that “the intention was to make such a will for the intestate as, if he had died testate, he would have been most likely to have made for himself,” and again, that “its obvious policy was to follow the lead of the natural affections, and to consider as most worthy the claims of those who stand nearest to the affections of the last occupant. It ought, therefore, at all times to be liberally construed in favor of those to whom the intestate himself, had he made a will, might be supposed to be most favorable, without reference to common law rules or feudal disabilities.”

§ 327. **Local laws govern the descent of real property.** All questions of the distribution and descent of real estate must be determined by the law of the jurisdiction in which the property is situated. Among a great mass of authorities which sustain this proposition are *Boyce v. St. Louis*, 29 Barb. 650; *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Bryan v. Moore*, 11 Mart. (La.), 26, 13 Am. Dec. 347, and authorities cited in note; 3 Am. & Eng. Encyclop. Law, p. 566; *Abston v. Abston*, 15 La. Ann. 137; *Potter v. Titcomb*, 22 Me. 300; *Elliott v. Minto*, 6 Madd. Ch. 16; *Chapman v. Robertson*, 6 Paige, 627, 3 L. ed. 1128, 31 Am. Dec. 264.

§ 328. **Who may inherit—Views of Professor Walker.** When heirs take by descent, they take as tenants in common. Posthumous children may inherit. Bastards can inherit and transmit inheritance from the mother. Children born before marriage and acknowledged after, and children born during a marriage void in law, are legitimate, and may inherit. Aliens can inherit and transmit inheritance. Actual seizin of the ancestor is not necessary. Males are not preferred to females, except in case of husband and wife. Descent *per capita* is where all the heirs in the same degree take alike. Descent *per stirpes* is where the heirs are of different degrees; and the children of those dead take together the shares of

their deceased parents. It extends no further than to children and their issue, brothers and sisters and their issue, and the brothers and sisters of the ancestor from whom the estate came, and their issue. Ancestral property is realty which came to the intestate by descent or devise from a now dead ancestor, or by deed of actual gift from a living one; there being no other consideration than that of blood. Non-ancestral property is realty which came to the intestate in any other way, and personalty. Ancestral property passes as follows: 1, To the children and their issue, however remote; 2, To the husband or wife relict for life; 3, To the brothers and sisters and their issue, however remote, whether of the half blood or the whole blood, provided they be of the blood of the ancestor; 4, To the ancestor from whom it came, if living; 5, To the ancestor's children, and their issue; then to the ancestor's husband or wife relict if a parent of the decedent, for life; then to the ancestor's brothers and sisters, and their issue; then to the half brothers and sisters of the intestate and their issue though not of the blood of the ancestor; 6, To the next of kin of the intestate, being of the blood of the ancestor, determined by the rule of the civil law; 7, To the State. Non-ancestral property, including personalty, descends as follows: 1, To the children and their issue, however remote; 2, To the intestate's husband, or wife relict; 3, To the brothers and sisters of the whole blood, and their issue, however remote;² 4, To the brothers and sisters of the half blood and their issue, however remote; 5, To the father, then to the mother; 6, To the next of kin of the blood of the intestate; 7, To the State.³

² Jenks v. Langdon, 21 Ohio St. 362.

³ Walker, Am. Law, p. 403.

Posthumous child.—One born after the death of its father; or, when the Cæsarian operation is performed, after that of the mother. Posthumous children are entitled to take by descent as if they had been born at the time of their deceased ancestor. When a father

has made a will without providing for a posthumous child, such a will is in some States, as in Pennsylvania, revoked *pro tanto* by implication. (4 Kent's Com. 506 Dig. 28, 5, 92; Ferrière, Com. h. t.; Domat, Lois Civiles, part 2, liv. 2, t. 1, s. 1; Merl. Rep. h. t.; 2 Bouv. Inst. n. 2158; 2 Bouvier's Law Dict. 358.

§ 329. **Can a patricide inherit?—An extreme case cited.** The rules regulating the descent of property allow the heirs of a patricide even to inherit the estate acquired by him through this atrocious crime, acknowledged to have been perpetrated solely for the purpose of securing the estate. In a recent case the Supreme Court of Pennsylvania awarded an estate to the heirs of one Carpenter, who had murdered his father solely for the purpose of securing the property.⁴ It is difficult to understand upon what principle of natural justice courts exclude innocent progeny of illicit intercourse from an inheritance through the father but will allow that same father to inherit although branded with the awful crime of patricide.

The pitiless precision with which the rules regulating the devolution of real property are enforced, is strikingly instanced in the recent case of *Owens v. Owens*, 100 N. C. 240, where the wife had been convicted of the murder of the husband. The court recognized her right to dower in the estate left by her victim, and it is extremely difficult to see just why this ruling is not correct. Some extenuating circumstances might be shown, that would afford ground for executive pardon, in which case it would be against public policy to leave the widow dependent upon charity for her support, even where she is allowed, in a certain sense, to reap the benefit of her crime by receiving her dower interest. I am clearly aware that this proposition is revolting to every sense of natural justice, and I would only place such a theory upon the ground of public policy. The case referred to was cited and doubted in *Riggs v. Palmer*, 115 N. Y. 506, where the court of last resort refused to recognize any right to the inheritance in a grandson who had murdered his grandfather in order to secure the estate. It should be added, however, that in the case last cited, both Danforth and Gray dissented, and held with the North Carolina court, that there should be no disturbance of the rules regulating the succession. Obviously, if the murderer suffers the death penalty, he gains nothing by his crime; and if the circumstances justify the interference of the pardoning power, the exercise of that

⁴ Carpenter's App., 170 Pa. St. 203.

power must be considered as based upon sufficient reason. In which event, to restore the murderer to society, without his rights of inheritance is, perhaps, to subject him to a mendicant's existence at the expense of others. I must assume that he could only obtain employment in a brief and intermittent way, that he is generally shunned by the community, that few avenues are open to him for individual effort, and that strangers to the very blood he has shed are reaping the advantage of his crime. It is inevitable that some one must have that advantage of that crime, and, harsh as it may seem, what is there in reason or logic, that should prevent the innocent offspring of such murderer from receiving through him the ancestral estate. Personal preference would suggest such legislation as would secure to his posterity at least, his inheritable rights. I admit the question one of extreme perplexity, but there is always a "next best thing" in every emergency.

§ 330. Rule as to bastards. *Legitimation by subsequent marriage.* A child born out of lawful wedlock, and legitimated by the subsequent marriage of his parents, carries the status of legitimacy with him wherever he goes, and as a legitimate child is entitled to inherit real property belonging to his father, although that property may be located in another State than the one where the legitimization occurred. This principle was directly established for the first time in this country in the celebrated case of *Miller v. Miller*, 91 N. Y. 320.⁵

Bastard. A bastard and his issue cannot take, under the Statute of "Distributions" or "Descent and Distribution," from his mother's collateral kindred.⁶ They can inherit and transmit inheritance from the mother.

a. *Review of the celebrated Miller case.* Bastards may inherit when legitimated by the subsequent marriage of the parents. By far the most celebrated case involving the question of what status is accorded an ante-nuptial child whose parents subsequently intermarry is that of *Miller v. Miller*, 91 N. Y. 315. This case has attracted wide attention, and was most stub-

⁵ See Rice on Probate Law, 96-553; Ross v. Ross, 129 Mass. 243.

⁶ Pratt v. Attwood, 108 Mass. 40.

bornly fought in all its stages by counsel of exceptional ability. The General Term of the Supreme Court refused to sanction the proposition that the status of legitimacy, which was accorded to the plaintiff by the law of Pennsylvania (in which State he was born, and where his parents subsequently intermarried), followed him into the State of New York, where the subsequent marriage of the parents of a child born out of lawful wedlock did not endow him with the status of legitimacy. The devolution of real property situate in the State of New York must be governed exclusively by the *lex loci rei sitæ*. And in contemplation of law, as interpreted in that jurisdiction, the plaintiff was still *a filius nullius* — an illegitimate. The Court of Appeals, after the most mature deliberation, overthrew the conclusion of the Supreme Court, and utterly repudiated the reasoning upon which it was founded, and held that the status of legitimacy, having been once affixed to a citizen of this country by the laws of a sister State, that status followed him into every jurisdiction into which he may come, and invested him with all the rights and privileges he had previously acquired under the law of that particular State. This case must always stand as one of the beacon lights on this subject.⁷

In the later case of *Ross v. Ross*, 129 Mass. 243, Chief Justice Gray cites and comments upon every case up to that date (1880), and after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English court in holding, in *Doe v. Vardill*, that an heir to land in England must be actually born in wedlock, do not apply in this country, and that a person declared to be a legitimate child of another, by the law of the State of the domicil, must be held to have all the rights of a legitimate child wherever he goes.

An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the statute, so called, of Merton, 20 Hen. III, chap. 9, which it was claimed, negatively enacted that the English

⁷ The elaborate discussions of the English courts in *Doe v. Vardill*, 5 Barn & C. 438; *Birtwhistle v. Vardill*, 2 Clark & F. 571, 7 Clark & F. 895.

heir must be born in lawful wedlock. Lord Brougham, in 2 Clark & F. 582, and again in 7 Clark & F. 914, combats this position with arguments that the courts of New York and Massachusetts seemed to think unanswerable.⁸

§ 331. **Legal status of an adopted child.** The case of *Ross v. Ross*, 129 Mass. 243, is particularly instructive on the question of the inheritable rights and legal status of adoptive children. The opinion is exhaustive, and cites in support of the main argument several well considered cases. It sustains all the contentions of the celebrated *Miller case*, and holds that the act of adoption — under the formulas of the place of domicile — confers certain inalienable rights that follow the child so adopted and enable him to inherit real estate as the true heir of his adopting parents.

“An adopted child becomes entitled to succeed to the estate of the adopting parent in the same manner as if it had been a child of the blood of such parent,⁹ and it has been held that if an adopted child dies before its adopting parents, its children will take by right of representation in the same manner as if it had been a natural child.¹⁰ But the adopted child becomes heir to the adopting parent only; if the law permits adoption by the husband without the assent of his wife, the child so adopted becomes the heir of the husband alone, and sustains no relation to and is not heir of the wife.¹¹ And, indeed the general effect of the decisions is to deny the right of the adopted child to succeed to the estate of any member of the adopting family other than the adopting parents. So, it has been held, that an adopted child does not succeed to the estate of the adopting parents' ancestors,¹² nor to the estate of children born to the adopting parents.¹³

§ 332. **Advancements.** If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the

⁸ *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603.

⁹ *Barnes v. Allen*, 25 Ind. 222.

¹⁰ *Place v. Klink*, 51 Ga. 220.

¹¹ *Barnhizel v. Ferrell*, 47 Ind. 335.

¹² *Sunderland's estate*, 60 Ia. 732.

¹³ *Keegan v. Geraghty*, 101 Ill. 26; cited from 24 Am. & Eng. Ency. of Law, 424.

purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust, with a right of selection, is an advancement.

a. *How adjusted.* When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.¹⁴

¹⁴ Laws of New York, chap. 547 (1896).

CHAPTER XXIII.

TITLE BY PURCHASE.

Art. I. Limitation and adverse possession.

SEC. 333. Nature and scope of title by prescription.

334. Founded on public policy.

335. The Statute of Limitations in its relations to adverse possession.
a. Saving clauses.

336. The rule as to intention stated.

337. Presumptions arising from lapse of time and notorious possession.

338. Actual residence not necessary, but occupancy must be open and notorious.

339. Time required to perfect the title.

340. Cannot affect title of the government.

341. Continuity and privity of possession required.

342. Constructive adverse possession.

343. The doctrine of "tacking."

344. What evidentiary facts are pertinent.

345. What constitutes color of title.

a. Not necessarily founded on a written instrument.

b. Generally a question of law for the court to decide.

§ 333. **Nature and scope of title by prescription.** Title by prescription is a right which a possessor of land acquires by reason of his adverse possession during a period of time fixed by law, and where it does not originate in fraud, and is under a claim of right or color of title. Prescription is a legal fiction to quiet ancient possession. It rests upon the presumption that there was a grant which by lapse of time (usually twenty years), has become lost. The presumption is rebuttable. The doctrine is broader than that of a Statute of Limitations, although based upon analogous principles of repose to society.¹

¹ Anderson's Law Dict., tit. "Prescription;" citing *Burdell v. Blain*, 66 Ga. 170; *Folsom v. Freeborn*, 13 R. I. 205; *Brookline v. Mackintosh*, 133 Mass. 226; *Thomas v. England*, 71 Cal. 458; *Bozeman v. Bozeman*, 82 Ala. 391.

Title by prescription rests largely upon the theory that no person will submit to a deprivation of his rights for the period prescribed by the Statute of Limitations — usually twenty years — without making an attempt to assert those rights. And there is the further presumption that the possession of property for so long a period is by virtue of some previous grant which has been lost or destroyed.² The term prescription is most frequently applied to easements.³ But in popular parlance, it has been quite generally confounded with title by adverse possession.

§ 334. Founded on public policy. The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute.

These prescriptive rights indelibly impress themselves upon every title obtained by adverse possession, and the idea of adverse possession is, on the other hand, indelibly impressed with the notion of some set limit, such as is imposed by the recitals of the various Statutes of Limitation. I am far from asserting that adverse possession, title by prescription, and the Statute of Limitations are co-ordinate topics. On the contrary, I am fully aware of their very divergent meaning and attributes. But I do assert that in any well digested conception of adverse possession, we instinctively associate the period of limitation and the nature and scope of the prescriptive right with the term "adverse possession." The three, in their entirety, comprise our matured and full blown theory of what adverse possession is, and of the legal conceptions upon which it is grounded.

§ 335. The statute of limitations in its relation to adverse possession. The statute of limitations is highly favored under all judicial systems, as a statute intended to quiet controversy, settle titles, and extinguish fraud. Such statutes are eminently, and emphatically "statutes of repose," and have been adopted with substantial uniformity by all our States. They impose diligence on, and vigilance in him who is entitled to bring an action. But for its beneficial

²Edson v. Munsell, 10 Allen (Mass.) 568. ³See *ante*, sect. 90.

functions the courts would be vexed with endless litigation over moribund claims and Silurian titles, that would subvert all elements of value in real property. The principle that they embody was of slow gestation in the English law, but its obvious advantages became widely recognized, and both the English and American courts are fully committed to the principles involved in such enactments.⁴ In brief, they are not to be evaded by construction,⁵ and courts are not bound to give them that construction which will operate more prejudicially to those whose remedies and rights are to be forfeited by them, but rather in favor of the right which in all such cases is imperiled.⁶

a. *Saving clauses.* Statutes of Limitation usually contain saving clauses in favor of persons under any disability, such as coverture, infancy, lunacy and the like, and the time of the statute does not run during the continuance of the disability. As a general rule, such saving clauses apply only to cases where the disability existed at the time when ouster occurred, or adverse possession commenced, and the right of action accrued.⁷

§ 336. The rule as to intention stated. One who by mistake occupies for twenty years or more land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not, therefore, acquire title by adverse possession to land beyond the true line.⁸

⁴ *La Frombois v. Jackson*, 8 Cow. 589; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Bell v. Morrison*, 1 Pet. (U. S.) 360; *United States v. Wiley*, 11 Wall. 508, 513; *Spring v. Gray*, 5 Mass. (C. C.) 523; *Phillip v. Pope*, 10 B. Monr. (Ky.) 163; *McCarthy v. White*, 21 Cal. 495; *Dickenson v. McCamy*, 5 Ga. 486; *Gautier v. Franklin*, 1 Tex. 732; *Gorman v. Judge of Newago Circuit*, 27 Mich. 138.

⁵ *United States v. Wilder*, 13 Wall. 251.

⁶ *Elder v. Bradley*, 2 Sneed (Tenn.), 247.

⁷ *Mercer v. Selden*, 1 How. (U. S.) 37; 17 Peters, 61; *Lewis v. Barksdale*, 2 Breck. Marsh. 436; *Walden v. Gratz*, 1 Wheat. 292; *Roberts v. Moore*, 9 Am. Law Reg. 26; *Hayman v. Keally*, 3 Cranch's C. C. 325; *Seawell v. Bunch*, 6 Jones' Law, 197; *Tracy v. Ather-ton*, 36 Vt. 503; *Reimer v. Stuber*, 20 Penn. St. 458; *Stephens v. McCormick*, 5 Bush (Ky.), 181.

⁸ *Brown v. Gay*, 3 Me. 126; *Ross v. Gould*, 5 Id. 204; *Lincoln v. Edgecomb*, 31 Id. 345; *Worcester v. Lord*, 56 Id. 266, 96 Am. Dec. 456; *Dow v. McKinney*, 64 Me. 138.

We are aware that the soundness of this doctrine has been questioned. It has been said that the possession is not the less adverse because the person possessed intentionally, though innocently, and the further objection has been made that it introduces a new principle, by means of which the stable evidence of visible possession under a claim of right is complicated with an inquiry into the invisible motives and intentions of the occupant.⁹

§ 337. **Presumptions arising from lapse of time and notoriety possession.** The postulate we are called upon to support is this: Where the evidence discloses that proprietary rights and privileges have been exercised without objection or demur for a long period of time (usually twenty years), there is a legal presumption that such rights repose upon grant, devise or license, and are of lawful origin, and the law will presume a conveyance from lapse of time;¹⁰ as a deed,¹¹ or a lease,¹² and title to property generally from possession¹³

⁹ French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Wood, Lim. Act, sec. 263, and authorities cited.

Note.—A frequent recurrence to elementary truths in any science is the greatest safeguard against error, and in the ultimate analysis of the doctrine of adverse possession the distinctive element which supports the rule above stated at once becomes apparent. Indeed, it is aptly suggested in the familiar test imposed by Bracton: "*Quaerendum est a iudice quo animo hoc fecerit.*" (Co. Litt. 153b; Macdonel v. Weldon, 8 Mod. 55.) The inquiry must be, *quo animo* is the possession taken and held?

¹⁰ Field v. Brown, 24 Gratt. (Va.) 74; Brown v. McKinney, 9 Watts (Pa.), 565; Valentine v. Piper, 22 Pick. (Mass.) 85; Jackson v. McCall, 10 Johns. (N. Y.) 377; Fitzhugh v. Croghan, 2 J. J. Marsh, 429; Rooker v. Perkins, 14 Wis.

79; Frost v. Brown, 2 Bay, 133; Marr v. Gilliam, 1 Coldw. 488; Grimes v. Bastrop, 26 Tex. 310; Taylor v. Watkins, 26 Id. 688; Rhodes v. Whitehead, 27 Id. 304; Tinkham v. Arnold, 3 Me. 120; Brattle Square Church Proprs. v. Bullard, 2 Met. (Mass.) 363.

¹¹ Hepburn v. Auld, 9 U. S. 5 Cranch, 262, 3 L. ed. 96; Weatherhead v. Baskerville, 52 U. S. 11 How. 329, 13 L. ed. 717; Townsend v. Downer, 32 Vt. 183; Newman v. Studley, 5 Mo. 291; Blair v. Marks, 27 Mo. 579; Chiles v. Conley, 2 Dana, 22.

¹² Sellick v. Starr, 5 Vt. 255.

¹³ Birmingham v. Anderson, 40 Pa. 506; Youngman v. Linn, 52 Id. 413; Duke v. Thompson, 16 Ohio, 35; Society Prop. Gosp. v. Young, 2 N. H. 310; Cambridge v. Lexington, 17 Pick. 222; Fritz v. Brandon, 78 Pa. 342; Jackson v. McCall, 10 Johns. (N. Y.) 377; Casey v.

Independently of positive statute law, such a possession affords a violent presumption that the claimants to the land acquiesce in the claim of the possessor, or that they forbear for some substantial reason to controvert his claim or to disturb him in his quiet enjoyment. Secret possession will not do, as publicity and notoriety are necessary as evidence of notice, and to put adverse claimants upon inquiry. Mere casual occupation is not sufficient, but adverse and continuous possession is.¹⁴

§ 338. Actual residence not necessary, but the occupancy must be open and notorious. Actual residence of the claimant on the land is not usually deemed necessary to constitute an adverse possession, but it is required by statute in some of the States. But in every case the occupation must be open and notorious, showing an intention to claim ownership. It should be of such a character—so defiant and assertive—that the true owner may be supposed to have knowledge of it.¹⁵

Possession must be continuous, but is not broken by the death of the possessor.

§ 339. Time required to perfect the title. As to the length of possession which the plaintiff must show in order to sustain his title, the statutes of the several States differ. In most of them adverse possession, to give the right of action as against the holder of the legal title, must have continued for twenty years.¹⁶ This limit expands to twenty-five years

Inloes, 1 Gill. 430; Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90; McCorry v. King, 3 Humph. 267; Hoey v. Furman, 1 Pa. 295; Jackson v. Moore, 13 Johns. (N. Y.) 516; Alexander v. Walter, 8 Gill (N. Y.), 239; Lenior v. Rainey, 15 Ala. 667; McCall v. Doe, 17 Ala. 533; Sparks v. Rawls, 17 Id. 211; Wilson v. Glenn, 68 Id. 383; Hanford v. Fitch, 41 Conn. 486; Crow v. Marshall, 15 Mo. 499; Colvin v. Warford, 20 Md. 358; Frantz v. Ireland, 66 Barb. (N. Y.) 386.

¹⁴ Armstrong v. Morrell, 14 Wall. 145.

¹⁵ Thompson Sch. Dis. v. Lynch, 33 Conn. 330; Bengé v. Creagh, 21 Ala. 151; Ellicott v. Pearl, 35 N. S. 412; Faught v. Holloway, 50 Me. 24.

¹⁶ Jackson v. Oltz, 8 Wend. (N. Y.) 440; Holtzapple v. Phillibaum, 4 Wash. C. C. 356; Carroll v. Mays, 8 Dana, 178; Chiles v. Conley, 9 Id. 385; Cannon v. Phillips, 2 Sneed. 211; Abel v. Hutte, 8 Rich. 42.

in Michigan, while under the Texas statutes it is but two years. As the period is determined by statutes, which are liable to change, it will not be advantageous to attempt to give the time fixed in the several States. The computation of the time begins when the invasion of the owner's right begins.¹⁷ But no length of enjoyment short of the term of prescription gains any right or raises any presumption in favor of the user.¹⁸

§ 340. Cannot affect the title of the Federal government. While legal title may be lost by the true owner, and be acquired by any one holding adversely for twenty years,¹⁹ yet, where the legal title is in the United States, the Statute of Limitations raises no bar to the action. Mere possession of the land, though open, exclusive and uninterrupted, for the period mentioned, creates no impediment to a recovery by the government and, of course, none to a recovery by one who, within that period, receives its conveyance.²⁰

And through analogous principles the title to a public highway cannot be acquired by adverse possession.²¹ In New York adverse possession to bar the people must continue forty years.²²

§ 341. Continuity and priority of possession required. If the continuity of possession be broken, either by fraud or a wrongful entry, the protection given by the statute is lost.²³ There must not be a break of title between successive holders.²⁴ If within the period of limitations the premises have been abandoned by the tenant, or by those holding under him, or under whom he claims, the tenant cannot maintain

¹⁷ *Branch v. Doane*, 17 Conn. 402; s. c. 18 Id. 233; *Crosby v. Bessey*, 49 Me. 543; *Polly v. McCall*, 37 Ala. 29.

¹⁸ *Campbell v. Smith*, 3 Halst. (N. J.), 140; *Gilman v. Tilton*, 5 N. H. 231; *Haight v. Price*, 21 N. Y. 241; *Lawton v. Rivers*, 2 McCord (S. C.) 445; *Sherwood v. Vliet*, 20 Wis. 441; *Coe v. Wolcottsville Manf. Co.* 35 Conn. 175; *Hastings v. Merriam*, 117 Mass. 245.

¹⁹ *Baker v. Oakwood*, 123 N. Y. 16.

²⁰ *Burgess v. Gray*, 16 How. 48; *Doe v. Johnston*, 92 U. S. 343.

²¹ *Dillon, Municipal Corp.* par. 530; 1 Am. & Eng. Ency. of L. 297.

²² *La Framboise v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; *People v. Clark*, 10 Barb. (N. Y.), 120.

²³ *Francisco v. Fulde*, 37 Cal. 349.

²⁴ *Thompson v. Kauffeit*, 110 Pa. St. 209.

his defense under the statute,²⁶ and if his occupation has been interrupted in any way within twenty years there can be no title.²⁷

The adverse possessor must not yield nor surrender his possession under the pressure of any legal procedure instituted to oust him, which he can successfully resist, and if he does so, and an entry adverse to him is made, the continuity of his possession will be broken.

§ 342. Constructive adverse possession. A constructive adverse possession will extend over the whole of the tract included in the color of title, though but part be actually occupied.²⁷ But where a large tract of land, covered by the color of title, is divided into lots, the adverse possession of one lot will not extend over the others.²⁸

§ 343. The doctrine of "tacking." Where several persons enter on land in succession, the several possessions cannot be regarded as making a continuous possession without the presence of "privity in their estates." This is regarded as indispensable to authorize several successive owners to tack together the whole period of the adverse possession of all. The "privity" mentioned, exists between two successive adverse holders, when the latter takes under the earlier, as in case of descent, will, grant, or voluntary conveyance.²⁹

To make the possession of several successive occupants a continuous adverse possession a privity of estate must be shown between such occupants.³⁰

²⁶ Pollingsworth v. Sherman, 81 Va. 668.

²⁷ Stillwell v. Foster, 80 Me. 333.

²⁸ Woods v. Banks, 14 N. H. 101; Jackson v. Camp, 1 Cow. 605; Munro v. Merchant, 28 N. Y. (1 Tiff.), 9; Thompson v. Cragg, 24 Tex. 582; Schultz v. Lindell, 30 Mo. 310; Hinchman v. Whetstone, 23 Ill. 185; Prescott v. Nevers, 4 Mason, 330.

²⁹ Jackson v. Woodruff, 1 Cow. 277; People v. Livingston, 8 Barb. 253; but see remarks of Whitehead

J., in Den v. Hunt, 20 N. J. L. 487.

²⁹ Sherin v. Brackett, 36 Minn. 152; Hollingsworth v. Sherman, *supra*.

³⁰ Potts v. Gilbert, 3 Wash. C. C. 475; Shuffleton v. Nelson, 2 Sawy. 540; Doe v. Campbell, 10 Johns. 475; Wood, Lim. Act, sec. 271; Sawyer v. Kendall, 10 Cush. 241; Angell, Limitations, sec. 418, and cases there cited; Sedgw. & W. Trial of Title to Lands, sec. 745, 746, and cases cited.

§ 344. **What evidentiary facts are pertinent.** The payment of taxes may be shown in support of adverse possession and such payment, while in no sense conclusive, is "powerful evidence" of a claim of right,³¹ or it may be shown by the acts and declarations of the parties such as visible and substantial enclosure, the erection of buildings, digging a well, and other outward indications of proprietorship.³²

§ 345. **What constitutes color of title?** In *Brooks v. Bruyan*, 35 Ill. 393, in an action of ejectment, where the defense was adverse possession under the Statute of Limitations, with color of title, the court, by Beckwith, J., said: "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. The law presumes that all men act in good faith, until there is some evidence to the contrary; and in the absence of evidence, color of title is presumed to have been so acquired." Its strength or weakness is no moment.³³

Color of title may be founded upon a judgment or decree of court or upon a written instrument, as a deed of conveyance, which, if good in form, and duly executed, and professing to convey the title to lands, gives the grantee color of title, whether in fact it gives a good title or not.³⁴

a. *Not necessarily founded on a written instrument.* I wish in this connection to italicize one fact that has proved a rock of offense to many of my predecessors. Too frequently they leave the student under the impression that some written instrument is necessary to constitute color of title. In the vast majority of instances reliance is placed upon some document. But,

³¹ *Ewing v. Bennett*, 36 U. S. 41, 54; *Farrar v. Fessenden*, 39 N. H. 268; *Paine v. Hutchings*, 49 Vt. 314; *Cornelius v. Giberson*, 25 N. J. L. 36.

³² *Ewing v. Bennett*, 36 U. S. 53; *Dibble v. Rogers*, 13 Wend. 536.

It has been held, and it may be regarded as a rule of property that a division line established by parol agreement, if acquiesced in

for twenty years, is binding and conclusive. (*Sheldon v. Atkinson*, 38 Kan. 14; *Walker v. Simpson*, 80 Me. 143; *Fisher v. Bennehoff*, 121 Ill. 426; *Cleveland v. Obenchain*, 107 Ind. 591.)

³³ *Wright v. Matteson*, 18 How. 56.

³⁴ *Edgerton v. Bird*, 6 Wis. 527; *Brooks v. Bruyn*, 35 Ill. 394; *Hodges v. Eddy*, 38 Vt. 327; 3 Washb. Real Prop. 138.

color of title may rest upon a parol gift accompanied by possession and a survey and plat. Or it may rest upon open and notorious acts showing the extent of the boundaries of the land claimed, and indicating an intention to regard the occupant as the owner by such unequivocal acts as would create an estoppel.³⁵

It is settled law, quite beyond the reach of legal controversy, that one entering upon real estate as donee under a parol gift claiming ownership, and asserting such claim for a period of twenty years, during which time his occupancy is open, exclusive, adverse, and uninterrupted, will be considered to have a perfect title.³⁶

b. *Generally a question of law for the court to decide.* What constitutes color of title is solely a question of law for the court, but if this question is so implicated with the cognate question good faith, it may become a question to be submitted to the jury.

TITLE BY PURCHASE.—(Continued.)

Art. II. Estoppel.

SEC. 346. Nature and scope of the doctrine.

347. Office of estoppel.

348. Foundation of the rule.

349. Estoppel *in pais*—uses of.

350. Effects of declarations or admissions.

351. Silence, when fatal.

352. The element of fraud considered.

353. Not applied to parties under disability.

§ 346. **Nature and scope of the doctrine.** It is a principle that has come down to us unsuspected and unchallenged from the remote antiquities of the Roman law, that a grantee will not be heard to deny the validity of a mortgage to which his deed recites that the conveyance to him is subject.³⁷

Indeed, it has been affirmed that the entire development of the modern doctrine of estoppel, with all of its innumera-

³⁵ See *Atkinson v. Patterson*, 46 Vt. 750; *Rannels v. Rannels*, 52 Mo. 108; *Cooper v. Ord*, 60 Id. 420.

³⁶ *Pope v. Henry*, 24 Vt. 560;

Duff v. Learey, 146 Mass. 533; *Comins v. Comins*, 21 Conn. 413; *International Bank v. Fife*, 95 Mo. 118.

³⁷ *Howard v. Chase*, 107 Mass. 249.

ble ramifications, originated in this assertion of the Roman law. But our English ancestors were quick to improve upon it, and by encroachments, irresistible and gradual as those of a glacier, they fastened a multitude of salutary reforms upon the law of pledges, mortgages, deeds, and the like, until at this day we find our entire jurisprudence permeated with this principle of estoppel, which certain writers never tire of stigmatizing as an "oppressive obscuration of truth."

§ 347. **Office of estoppel.** The office of estoppels at law is like that of injunctions in equity, to preclude rights that cannot be asserted consistently with good faith and justice, and prevent wrongs for which there might be no adequate remedy.³⁸

§ 348. **Foundation of the rule.** In *Dickerson v. Colgrove*, 100 U. S. 578, 580, it is said: "The vital principle of estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is strictly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always applied so as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond that limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked."

It has been observed that a title by estoppel is where equity, and in some cases the law, in order to accomplish the purposes of justice which cannot otherwise be reached, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it does not allow the former to controvert or deny.³⁹

Estoppel by deed extends to persons claiming under the

³⁸ *Van Rensselaer v. Kearney*, 11 How. (U. S.), 297; *Buckingham v. Hanna*, 2 Ohio St. 551, 2 Sm. Lead. Cas. (7th Am. ed.), 672.

³⁹ 1 Washb. Real. Prop. 464; see, also, *Titus v. Morse* 40 Me. 348; *Horn v. Cole*, 51 N. H. 287.

person estopped in the same manner as an estoppel by record does. No person can avoid his own deed by which an estate has passed on the ground of his own fraud in executing it."

§ 349. **Estoppel in pais—Uses of.** What is an equitable estoppel *in pais*, as generally understood and applied in the courts? It is used to preclude a party from maintaining, by evidence, that which he has before expressly or tacitly denied, or disproving that which he has before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive." It is said by Justice Selden, in *Crawford v. Lockwood*, 9 How. Pr. (N. Y.) 550, "that it is essential to every estoppel *in pais* that it relates to some matter of fact which has been previously admitted or denied by the party claimed to be estopped. An admission by a person as to the law, or as to the legal effect of his conveyance, is never held to estop him. It is also necessary that the fact should be one of which the party claiming the benefit of the estoppel was ignorant. The basis of an estoppel *in pais* is fraud. It is not, it is true, essential that there should have been an intention to deceive. But there must have been a confidence reposed, which would be betrayed to the injury of one party, if the other is allowed to retract his admission or denial."

It is of the essence of an estoppel *in pais* that the party having the authority to act in the matter has knowingly done an act to influence the conduct of the other, and that the other has acted on the faith of that act.⁴⁰

§ 350. **Effect of declarations or admissions.** Declarations or admissions, expressed or implied, made for the purpose of influencing the conduct of another, if the designed effect ensues, are conclusive upon the party making them; but an estoppel being in its nature defensive, will not be used to

⁴⁰ Herm. Estoppel, 212; see, also, *House v. McCormick*, 57 N. Y. 310; *Burtner v. Keran*, 24 Gratt. 43; 3 *Field's Lawyer's Briefs*, 209.

⁴¹ *Shapley v. Abbott*, 42 N. Y. 443.

⁴² *St. Louis, A. & T. H. R. Co.*

v. Belleville, 10 West. Rep. 608, 122 Ill. 376; *Columbus v. Columbus St. R. Co.* 10 West. Rep. 440, 40 Ohio St. 98; *Lux v. Haggin*, 69 Cal. 255.

effectuate a gain, and will not be enforced further than is requisite to protection from injury.⁴³ The effect of an estoppel is confined to precluding the parties from contradicting the recital or admission on which the estoppel is founded.⁴⁴

Evidence tending to show that a party sought to be estopped is a stranger to the previous transactions, is always competent. It is error to reject such evidence, as it is a cardinal principle of the law governing estoppel, either by record, by deed or *in pais*, that the estoppel must be mutual. Third parties are in a state of alienage to the entire principle underlying this law of estoppel. They own no allegiance to it whatever; they can assert no rights under it, and are not bound by any of the obligations it enforces.⁴⁵

§ 351. Silence, when fatal. Evidence of a party's passivity in looking on and suffering another to improve land under an erroneous impression of title without making known his own claim, is always pertinent, and if effective as a means of

⁴³ Adler v. Pin, 80 Ala. 351.

⁴⁴ Philly v. Sanders, 11 Ohio St. 490; Beaupland v. Keen, 28 Pa. 124; Carver v. Astor, 29 U. S. (4 Pet.) 17 L. ed. 761.

⁴⁵ Sewell v. Watson, 31 La. Ann. 589; Lawrence v. Haynes, 5 N. H. 33; Whiting v. Independent Mut. Ins. Co. 15 Md. 297; Blake v. Tucker, 12 Vt. 39; Stow v. Wyse, 7 Conn. 214; Sheldon v. White, 35 Me. 370; Sargent v. Salmond, 27 Me. 539; Cooley v. Warren, 53 Mo. 166; State v. O'Gorman, 75 Id. 270; Dennie v. Smith, 129 Mass. 143; McWilliams v. Kalbach, 55 Iowa, 110; Grimmet v. Henderson, 66 Ala. 521; Goodnow v. Litchfield, 59 Iowa, 226; Walsh v. Agnew, 12 Mo. 520; Ray v. Gardner, 82 N. C. 146; Schench v. Stumpf, 6 Mo. App. 381; Galsgow v. Baker, 72 Mo. 441; Towsley v. Johnson, 1

Neb. 95; Corbley v. Wilson, 71 Ill. 209; Schuman v. Garratt, 16 Cal. 100; Hempstead v. Easton, 33 Mo. 142; Hill v. Epley, 31 Pa. 331; Lewis v. Castleman, 27 Tex. 407; Wright v. Hazen, 24 Vt. 143; Massure v. Noble, 11 Ill. 531; Nutwell v. Tongue, 22 Md. 419; Williams v. Chandler, 25 Tex. 4; Doe v. Errington, 8 Scott, 210; Catterlin v. Hardy, 10 Ala. 511; Watson v. Hewitt, 45 Tex. 472; Simpson v. Pearson, 31 Ind. 1; Wolcot v. Knight, 6 Mass. 418; Box v. Lawrence, 14 Tex. 556; Walton v. Walton, 80 N. C. 26; Carter v. Bennett, 4 Fla. 352; Smith v. King, 81 Ind. 217; Bell v. Hoagland, 15 Miss. 360; Thomason v. Odum, 31 Ala. 108; Comstock v. Smith, 26 Mich. 306; Maduska v. Thomas, 6 Kan. 153; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

proof, will prevent such party from asserting his superior title against such a purchaser.⁴⁶

The doctrine that a person remaining silent when he ought in the exercise of good faith to have spoken, will not be allowed to speak when he ought in the exercise of good faith to remain silent, cannot be extended to a person who is innocently ignorant of a fact upon which the right depends.⁴⁷

A party is not to be affected by statements, declarations and admissions made in loose, rambling manner in his presence and under circumstances which do not properly allow a reply; his surroundings may be such that a denial or a statement upon his part would be either impudent or useless, and the determining factor is, was he so situated as we can reasonably expect other men, under like circumstances, to make some protest or answer?

His duty to speak out is largely governed by the correct apprehension of these facts; his situation is to be carefully considered, and before an admission can be imputed to his silence it must distinctly appear that the emergency and surroundings were such as to preclude any utterance on his part.

§ 352. The element of fraud. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence he attempts to set up.⁴⁸ But it is not necessary to an equitable estoppel that the party should design to mislead.⁴⁹ As said by Folger, J., in *Continental National Bank v. National Bank of the Commonwealth*, 50 N. Y.

⁴⁶ *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79.

⁴⁷ *Tone v. Columbus*, 39 Ohio St. 281; *Frederick v. Missouri River, Ft. S. & G. R. Co.* 82 Mo. 402.

⁴⁸ *Jones v. McPhillips*, 82 Ala. 102, 116; *Shapley v. Abbott*, 42 N. Y. 443, 448; *Henshaw v. Bissell*, 18 Wall. 255; *Dorlarque v. Cress*, 71 Ill. 380; *Chandler v. White*, 84 Id. 435; *Hill v. Epley*, 31 Pa. St. 331; *Dezell v. Odell*, 3 Hill (N. Y.), 215; *Matlow v. Cox*, 25 Tex. 578.

⁴⁹ *Trustees, etc., v. Smith*, 118 N. Y. 634; *Continental National Bank v. National Bank of the Commonwealth*, 50 Id. 575; *Blair v. Wait*, 69 Id. 113, 116; *Bank v. Hazard*, 30 Id. 226, 230; *Galbraith v. Lunsford*, 87 Tenn. 89; *Wood v. Berkshire Insurance Co.* 108 Ind. 301, 304; *Anderson v. Hubble*, 93 Id. 570; *Gillett v. Wiley*, 126 Ill. 310, 323; *In re Bahia & S. P. Ry. Co. L. R.* 3 Q. B. 584.

575, 583, "it would limit the rule much within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him so estopped." This statement is quoted with approval in *Leather Manufacturers' National Bank v. Morgan*, 117 U. S. 96,

§ 353. **Not applied to parties under disability.** Parties under disability, as infants and married women, are not estopped unless their conduct has been intentional.⁶⁰ Indeed, it is said that no case has gone the length of holding a party estopped by anything he has said or done while he was under age.⁶¹

TITLE BY PURCHASE — (Continued.)

Art. III. Eminent Domain.

SEC. 354. Definition and nature.

355. Carefully guarded and strictly construed.

356. Due process of law.

357. No absolute right to trial by jury.

358. Notice is implied in the phrase "due process of law."

359. Scope of the power.

360. What constitutes taking.

361. The mode of payment.

362. Evidence of value in condemnation proceedings.

§ 354. **Definition and nature.** All individual title by whatever means acquired, is held in strict subordination to the public right of eminent domain, which imports an absolute surrender of any real property to the government, either in whole or in part, whenever the public exigencies, evidenced by established forms of law, demand it. Its exercise is largely confided by the Legislature to some corporate body, either domestic or foreign, and it must always proceed with due notice to the party interested whose land it seeks to condemn, and upon the unqualified tender of just compensa-

⁶⁰ See *Rogers v. Higgins*, 48 Ill.

211; *Oglesby Coal Co. v. Pasco*,

79 Id. 164; *Miles v. Lingerian*, 24

Ind. 385; *Baines v. Burbridge*, 15

L. Ann. 628.

⁶¹ *Brown v. McCune*, 5 Sandf.

(N. Y.) 224. See, also, *Lowell v.*

Daniels, 2 Gray (Mass.), 161; *Lack-*

man v. Wood, 25 Cal. 147.

tion. It may be freely exercised in the first instance, but exhausts its force after one application, and property once condemned or appropriated by this right of eminent domain cannot be again subjected to the same process instituted by some other agent or representative of the State.⁵²

Mr. Pierce antagonizes this view of the case by asserting that it may "where such appears to be the intent of the statute."⁵³ In some States express statutory provision exists whereby the company can resort to further condemnation proceedings in order to secure necessary accommodation. But the question as to whether the use is of such a public character as to warrant this extraordinary power is always open to and dependent upon the decision of the courts.⁵⁴

§ 355. Carefully guarded and strictly construed. The right of eminent domain, or that right by which the sovereign power, for public uses, takes and appropriates the property of the citizen, is one which should be watched with great vigilance. It should never be exercised except when the public interest clearly demands it, and then cautiously and in accordance with law. The right is one which lies dormant in the statute until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise.⁵⁵

Statutes conferring right of eminent domain are strictly construed.⁵⁶

§ 356. Due process of law. "No person shall be deprived of life, liberty or property without due process of law, nor

⁵² Mills, Em. Dom., 58.

⁵³ Pierce on Railroad, 150.

⁵⁴ Id. 659; Wood Railroad Law, 479.

⁵⁵ Citing Dyckman v. New York, 5 N. Y. 434; Cooley, Const. Lim. 527; Allen v. Jones, 47 Ind. 438 (1874).

⁵⁶ Sutherland, Stat. Constr. sec. 387; Gray v. Liverpool & B. R. Co. 9 Beav. 381; Martin v. Rushton, 42 Ala. 289; Alabama G. S. R. Co. v. Gilbert, 71 Ga. 591; Chicago & E. I. R. Co. v. Wiltsie, 116 Ill. 449; Spofford v. Bucksport & B. R. Co.

66 Me. 26; Binney's Case, 2 Bland. Ch. 99; Cox v. Tipton, 18 Mo. App. 420; Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co. 82 Mo. 121; Watson v. Avquacksnonack Water Co. 36 N. J. L. 195; Jersey City v. Central R. Co. 40 N. J. Eq. 417; State v. Hudson Terminal R. Co. 46 N. J. L. 289; Re Amsterdam Water Comrs. 96 N. Y. 351; Lea v. Johnston, 31 N. C. 15; Miami Coal Co. v. Wigton, 19 Ohio St. 560; Pittsburg & L. E. R. Co. v. Bruce, 102 Pa. 23.

shall private property be taken for public use without just compensation," are provisions of the Federal Constitution which it is intended the courts shall enforce, even against persons assuming to act under the authority of the government.⁵⁷

§ 357. **No absolute right to trial by jury.** It is true that the ascertainment of just compensation is a judicial proceeding, but a party has no inherent right to have such compensation fixed by jury. This has been repeatedly held.⁵⁸

"This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."⁵⁹ That kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.⁶⁰

§ 358. **Notice is implied in the phrase "due process of law."** "*Due process of law* is not confined to judicial proceedings but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature," and, generally stated, it means "an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights."⁶¹ Consistent with these principles, the property of a citizen cannot be taken by the power of eminent domain without some notice to the owner, or some opportunity being afforded him, at some stage of the proceeding, to be heard as to the compensation to be awarded him.

⁵⁷ U. S. v. Lee, 106 U. S. 196, 127 L. ed. 171.

⁵⁸ Kohl v. United States, 91 U. S. 375, 23 L. ed. 452; United States v. Jones, 109 U. S. 513, 27 L. ed. 1015; Great Falls Mfg. Co. v. Garland, 25 Fed. Rep. 521; Ames v. Lake Superior & M. R. Co. 21 Minn. 241; People v. Smith, 21 N. Y. 595.

⁵⁹ Walker v. Sauvinet, 92 U. S. 90, 92, 93, 23 L. ed. 678, 679; Ken- nard v. Louisiana, 92 U. S. 480, 23

L. ed. 478; McMillen v. Anderson, 95 U. S. 37, 41, 42, 24 L. ed. 335, 336; Davidson v. New Orleans, 96 U. S. 97, 104, 105, 24 L. ed. 616, 619, 620; Missouri v. Lewis, 101 U. S. 22, 31, 25 L. ed. 989, 992.

⁶⁰ *Ex parte* Wall, 107 U. S. 265, 289, 290, 27 L. ed. 552, 562; Kansas v. Ziebold, 123 U. S. 623, 637, 638, 654, 31 L. ed. 205, 208.

⁶¹ Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289.

§ 359. **Scope of the power.** The right to take private property for public uses knows no bounds, provided just compensation be awarded, and as regards the expediency of exercising the power the legislature is the sole, final, and uncontrolled judge; this being a political and not a judicial question. But whether the use for which the statute proposes to take the property of the citizen be public or private, is a judicial question solely for the courts to decide, concerning which the determination of the Legislature, while entitled to great respect, is not conclusive.⁶² It is a cardinal principle of American constitutional law that a legislative enactment may be pronounced unconstitutional by the courts where it assumes to confer power not legislative in its nature or because it offends some specific provision of the National or State constitution.⁶³ But especially would I call attention to the great case of *Taylor v. Porter*, 4 Hill (N. Y.), 140, where Mr. Justice Bronson reviews with exhaustive learning and incisive logic the various phases of the intricate and much agitated question.

§ 360. **What constitutes "taking."** *Eminent domain.* "Taking cannot be limited to the absolute conversion of the realty, but it is construed to include all cases where the value is impaired by irreparable and permanent injury to it. The direct consequences of the appropriation must be considered.⁶⁴ Any permanent change in title or incumbrance on property is a taking in contemplation of law and any exclusion of the owner or partial destruction of his land is a "taking." So a deposit of stone, rubbish, sand or other material upon the land of an adjoining owner is a taking and requires compensation at the suit of the owner.⁶⁵ In the *Pumpelly case*, above cited, Mr. Justice Miller employs the following suggestive language: "It remains true that where real estate is

⁶² *Bankhead v. Brown*, 25 Ia. 540, and cases cited.

⁶³ *Comm v. Maxwell*, 27 Pa. St. 456; *Mott v. Pa. Cent. R. R. Co.* 30 Pa. St. 9-37.

⁶⁴ *Pumpelly v. Green Bay Canal Co.* 80 U. S. 166; *Foster v. National Bk.* 57 Vt. 128; *Wilmes v. Minne-*

apolis R. R. Co. 29 Minn. 242; *Mills on Eminent Domain*, 119.

⁶⁵ *East. P. R. R. Co. v. Schollenberger*, 54 Pa. 144; *Glover v. Powell*, 10 N. J. 211; *Cushman v. Smith*, 34 Me. 247; *Hendershott v. Ottumwa*, 46 Ia. 658; *Cooley*, *Const. Lim.* 671.

actually invaded by superinduced additions of water, earth, sand and other materials, or by having an artificial structure placed upon it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country and certainly not with sound principle." These views are sustained by a number of cases and must be edifying reading to some alleged justices who have been propagating the contra view.⁶⁶ The language in *Ashley v. Port Huron*, *supra*, merits reproduction: "The right of an individual to the occupation and enjoyment of his own premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. A municipal charter *never gives and never could give* authority to appropriate the freehold of a citizen without just compensation, whether it be done through an actual taking of it for streets or buildings or by flooding it so as to interfere with the owner's rights." In *Green Rapids Co. v. Jarvis*, 30 Mich. 308, the court say that "this is a proposition so self-evident as hardly to admit of illustration by any example which can be made clearer, and which does not need the support of authorities."

§ 361. **The mode of payment.** *Just compensation*, when ascertained, must always be paid in money. Money is the measure of compensation. Compensation represents the money value of property taken or damaged. Just compensation can be made in no other medium.⁶⁷ Payment need not necessarily precede the condemnation.

⁶⁶ See *Northern Trans. Co. v. Chicago*, 99 U. S. 635; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504; *Ashley v. Port Huron*, 35 Mich. 296; *Aurora v. Reed*, 57 Ill. 30; *Pettigrew v. Evansville*, 25 Wis. 223; *Hooker v. New Haven Co.* 14 Conn. 146; *Rhodes v. Cleveland*, 10 Ohio, 159; *Chicago v. Taylor*, 125 U. S. 161; *Cumber-*

land v. Willison, 50 Md. 138; *Hay v. Cohoes Co.* 2 N. Y. 159.

⁶⁷ *Dill. Mun. Corp.* 4th ed. sec. 612; *Cooley, Const. Lim.* 963; *State v. Ravine Road Sewer Comrs.* 39 N. J. L. 665; *Com. v. Peters*, 2 Mass. 125; *Chesapeake & O. R. Co. v. Halstead*, 7 W. Va. 301; *Vanborne v. Dorrance*, 2 U. S. (2 Dall.), 304, 1 L. ed. 391; *Mills, Em. Dom. sec.* 135.

§ 362. **Evidence of value in condemnation proceedings.** Any evidence is competent which legitimately bears upon the question of the marketable value of the property sought to be condemned, and as the question of value rests mainly in opinion, persons acquainted with the value are competent to testify on the question of damages.⁶⁸ The market value of the land taken is the amount of damage sustained, and supposed future interests or value should be eliminated from the consideration.⁶⁹ The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the use to which it is plainly adapted. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any other use. Others may be able to use it and make it subserve the necessities or conveniences of life. So many and varied are the circumstances to be taken into account that it is impossible to formulate a rule to govern a condemnation appraisalment in all cases. Exceptional circumstances will modify and relax the most carefully guarded rule.⁷⁰

The following authorities establish the proposition that the compensation to be awarded the owner of the land condemned cannot be based upon the value of the property to the person or company in charge of the public use, nor by its necessities, and that it is not proper to take into consideration the profits which may result from the use of the land, especially where the profits depend upon the expenditure of large sums of money in carrying out the contemplated enterprise.⁷¹

⁶⁸ Indianapolis D. & S. R. Co. v. Pugh, 85 Ind. 279; Swan v. Middlesex Co. 101 Mass. 173; King v. Minneapolis Union R. Co. 32 Minn. 224.

⁶⁹ Union Depot S. R. & T. C. v. Brunswick, 31 Minn. 297; Mills, Em. Dom., sec. 168.

⁷⁰ Gilmer v. Lime Point, 19 Cal. 47, Field, J.

⁷¹ Tide Water Canal Co. v. Archer, 9 Gill. & J. 481; Gardner v. Brookline, 127 Mass. 358; Burt v. Wigglesworth, 117 Mass. 302; Reading & P. R. Co. v. Balthaser, 126 Pa. 1; Dorlan v. East Brandywine & W. R. Co. 46 Pa. 520; Stockton & C. R. Co. v. Galgiani, 49 Cal. 139.

TITLE BY PURCHASE — (*Continued*).*Art. VI. Execution.*

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§ 363. **Controlled by statutory enactments.** This is a title unknown to the common law, and is largely the creature of modern statutory enactment.⁷² Conspicuous instances of this mode of acquiring title are of every-day occurrence. And whenever a sheriff or referee disposes of a debtor's real estate by virtue of an execution, the title, which the purchaser derives, is a "title by execution," except, perhaps, in the case of sales to satisfy delinquent taxes. To acquire this form of title there must be the most rigid adhesion to all the methods indicated by the statute.⁷³ While ample provision exists in every jurisdiction for the levy and sale of real property to satisfy a judgment creditor, the phraseology employed, and the methods pursued, are somewhat divergent. But all statutes agree in enforcing the rule "*caveat emptor*," and the purchaser is never allowed to demand a full warranty deed.⁷⁴ Whatever infirmities are found lurking in the title, the purchaser must accept, as he merely occupies the debtor's posi-

⁷² Duvall v. Waters, 1 Bland Ch. 83; Dickerman v. Burgess, 20 Ill. (Md.) 569. 266.

⁷³ Kintz v. Long, 30 Pa. St. 501; ⁷⁴ Neal v. Gillaspay, 56 Ind. 451; Tyler v. Wilkerson, 27 Ind. 450; Roberts v. Hughes, 81 Ill. 130. Pickering v. Reynolds, 111 Mass.

tion as to liabilities of every description, and whatever was a legal charge or lien upon the property before the sale, continues after it.⁷⁵ Title by execution is otherwise known as "title by involuntary alienation," the presumption being that the owner of the property is divested of the fee by some compulsory process of the courts that did not originate in any volition of his own.

§ 364. Outline of proceedings to perfect title by execution. It is the duty of the sheriff, on receiving an execution, to levy upon the property. In accomplishing this he is not required to take actual physical possession, but rather by some open and notorious act evincive of constructive possession, and his levy is completed by duly returning a description of the realty levied upon. His next step contemplates the appraisement of the property, which is effected by the aid of three disinterested freeholders of the county in which the land is situated who are designated and sworn by the sheriff. This appraisement, when made, is properly endorsed and filed for record in the office of the County Clerk, where it has the effect of notice to all persons subsequently dealing with the property. This is followed by an advertisement of sale, which must appear in some paper published in the county, and if there be none, then in any paper circulating within the county. He is also required to post notices in various public places designated by the statute. The length of time these various notices must appear, is also regulated by statute in the various States, but is rarely, if ever, less than thirty days. Due time having elapsed, the sale takes place on the day designated. This must be at public auction from the front door of the court house. After which the sheriff makes a return of the execution with his proceedings thereon to the court from which it issues. That court will then proceed to confirm the sale so made, and direct the issuance of a deed. The confirmation may be opposed by any party in interest, but where it appears that the proceedings have been conducted with rigid conformity with the statutory require-

⁷⁵ *Frost v. Yonkers Savings Bank*, Sharp, 4 Cal. 349; *Hildreth v. 70 N. Y. 558*; *Polhemus v. Empson*, 27 N. J. Eq. 190; *Bryan v. Sands*, 2 Johns. Ch. (N. Y.) 35.

ments, it is rarely withheld. The deed then issues, and its recitals are largely matters of express statutory provisions.

§ 365. Rights of the purchaser. A purchaser of land at an execution sale acquires title to the land if the judgment debtor owned the land at the time of the sale, and may go into equity to set aside a fraudulent deed of the judgment debtor, although he is not in possession of the property.⁷⁶ A creditor having a valid lien upon the real estate of his debtor by the levy of an execution issued upon a valid judgment may sell such real estate upon his execution, and the purchaser at such sale may impeach a prior fraudulent conveyance made by the judgment debtor, in an action at law. The purchaser may resort to a bill in aid of execution, but he is not compelled to adopt the equitable remedy.⁷⁷

§ 366. Title becomes absolute on the issuance of the deed. Purchasers at execution sales are neither entitled to the possession of the property nor to participate in the rents and profits thereof, until their title has become absolute, by the

⁷⁶ *Mohawk Bank v. Atwater*, 2 Paige, 54, 2 L. ed. 810; *Hager v. Shindler*, 29 Cal. 48; *Bunce v. Gallagher*, 5 Blatchf. 481; *Ormsby v. Barr*, 22 Mich. 80; *Jones v. Smith*, 22 Id. 360; *Hoxie v. Price*, 31 Wis. 82; *Gould v. Steenberg*, 84 Ill. 170; *King v. Carpenter*, 37 Mich. 363; *Newark M. E. Church v. Clark*, 41 Id. 730; *Stock Growers' Bank v. Newton*, 13 Colo. 245; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

⁷⁷ *Jackson v. Myers*, 18 Johns. 425; *Jackson v. Parker*, 9 Cow. 73; *Jackson v. Timmerman*, 7 Wend. (N. Y.) 436; *Stephens v. Sinclair*, 1 Hill (N. Y.), 143; *Cleland v. Taylor*, 3 Mich. 201; *Chautauqua County Bk. v. Risley*, 19 N. Y. 369; *Bergen v. Carman*, 79 N. Y. 146; *Bridge v. Eggleston*, 14 Mass. 245; *Den v.*

Underwood, 4 Wash. C. C. 129; *Hinde v. Longworth*, 24 U. S. (11 Wheat.), 199, 2 L. ed. 454; *Doe v. Rowe*, 4 Bing. N. C. 737; *Middleton v. Sinclair*, 5 Cranch, C. C. 409; *Carter v. Castleberry*, 5 Ala. 277; *Rhodes v. Magonigal*, 2 Pa. 39; *Webb v. Dean*, 21 Id. 29; *Eastman v. Schettler*, 13 Wis. 324; *Warren v. Williams*, 52 Me. 343; *Mulford v. Peterson*, 35 N. J. L. 127.

The purchaser at an execution sale takes his title subject to such liens, easements and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith and without any notice, actual or constructive, of the existence of such lien, easement or equity." (*Freem. Executions*, sec. 336.)

failure of the persons interested to redeem within the time prescribed by law.⁷⁸

It is true that for the purpose of perfecting his title to the real estate — that which he bought — the confirmation relates back to the sale, and no other person can in the meantime obtain any rights that will affect the title; but it cannot be held to relate back for the purpose of giving the purchaser the right of possession and the right to the rents and profits.⁷⁹

§ 367. **Delinquent taxes — Execution to satisfy.** a. *What are taxes?* By the concurrent opinion of lawyers, lexicographers and political economists as well as by the general and popular understanding taxes are burdens or charges imposed by the Legislature upon persons or property, to raise money for public purposes or to accomplish some governmental end. A tax is a portion of the property of individuals which is taken from them by the government and disposed of by it.⁸⁰ No authority or even dictum can be found which asserts that there can be any legitimate taxation where the money to be raised does not go into the public treasury or is not destined for the use of the government, or some of the public governmental divisions of the State. In other words, a public governmental use or purpose is involved in, and is essential to the idea of a tax. "I concede," says Black, Ch. J., in the *Sharpless case*, 21 Pa. St. 167, "that a law authorizing taxation for any other than public purposes is void." Again: "A tax for a private purpose is unconstitutional, although it pass through the hands of public officers."

b. *Taxation for private purposes void.* A tax for private purposes is, to use the strong yet apt expression of Lowe, J., in the *Wapello County case*, 13 Iowa, 405, "A solecism in language." Our system of taxation throughout is inspired by political necessity, as without a revenue there can be no such thing as a stable government, at least on an elaborate scale. Theoretically, the citizen is assumed to receive a compensation for the taxes paid, in the security the law affords to his

⁷⁸ Rorer, Jud. Sales, p. 387; Cas-
silly v. Rhodes, 12 Ohio, 96; Houts
v. Showalter, 10 Ohio St. 128.

⁷⁹ Beggs v. Thompson, 2 Ohio,
96, 15 Am. Dec. 539.

⁸⁰ 21 Ency. Brit. 37.

person and property, and the guarantees it throws around his business transactions in the ready access it gives to the remedial justice of our courts and in the rigid impartiality with which it enforces the devolution of his property according to the terms of his last will and testament.

c. *Views of John Stuart Mill.* Still the foundation of the taxing power is political necessity, and taxes are in effect, as Mr. Mill contends, sacrifices made for the public good, "equality of sacrifice" being the rule dictated by Justice.⁸¹ Taxation extends to all property and all the persons within the jurisdiction of the State and for the non-payment of lawful tax the property of the citizen may, without judicial proceeding, and without special notice to him be sold at public auction to pay it. Proceedings so arbitrary and provocative of so much hardship fully justify the remark of the Supreme Court of Pennsylvania, that the divestiture of ownership by the tax laws, and sales thereunder, exhibit "the instance in which a constitutional government approaches most nearly to an unrestrained tyranny."⁸² It is only because we recognize the absolute necessity of some coherent and effective method of sustaining the revenues of the government upon a steady and ascertainable basis that these pitiless and stringent laws are not repealed as monstrous invasions of our constitutional rights. "If the right to impose a tax exists," says the Supreme Court of the United States, "it is a right which, in its nature, acknowledges no limit."⁸³

d. *Taxes may become a charge upon realty.* Taxes levied upon real estate become a charge upon the land itself, and if they are not paid, the land may be sold for the taxes due thereon, and the title will pass to the purchaser regardless of any incumbrance resting upon the land.⁸⁴

"All the property in the State is derived from or protected by its government, and hence it is held subject to its wants

⁸¹ 2 Polit. Econ. 370, 372.

⁸² Gault's Appeal, 33 Pa. St. 94.

⁸³ Weston v. Charleston, 2 Pet. 449; Bank of Commerce v. New York City, 2 Black, 631; Warren v. Paul, 22 Ind. 279; Herrick v. Randolph, 13 Vt. 529; McCullough v.

Maryland, 4 Wheat. 431; Sedgw. Const. Law, 554; Cooley, Const. Lim. 482; but read contra views in the Income Tax Cases decided May 20, 1895.

⁸⁴ Cooper v. Corbin, 105 Ill. 224.

in taxation and to certain important public uses both in war and in peace.”⁸⁵ Some ground this public right on sovereignty;⁸⁶ some on necessity, and for useful purposes;⁸⁷ some on implied contract.⁸⁸

e. *Execution must rigidly comply with the law.* A sale on an execution issued to collect delinquent taxes must, in all of its proceedings and particulars, rigidly conform with the material requirements of the statute.⁸⁹

f. *Purchaser of defective title usually remediless.* If a purchaser at tax sale fails to obtain a clear deed or title to the property purchased, he is remediless unless some statutory enactment requires the refunding of the amount paid in case of a defective title.⁹⁰

⁸⁵ Vattel, Law of Nations, sec. 244; 2 Kent's Com. 270; 1 Bl. Com. 139.

⁸⁶ 2 Kent's Com. 339; Grotius, bk. 1, chap. 1, sec. 6.

⁸⁷ Grotius, bk. 8, ch. 14, sec. 7; Puffendorf, Law of Nations, bk. 8, ch. 5, sec. 7; Bynkershock, Law of War, bk. 2, ch. 15; and see note to Gardner v. Newburgh, 2 Johns. Ch. 163, 1 L. ed. 333; West River Bridge Co. v. Dix, 47 U. S. (6 How.) 539, 12 L. ed. 548.

⁸⁸ Bogert v. United States, 2 Ct. ch. 164.

⁸⁹ 2 Rice on Evidence, 1289, citing Ritter v. Worth, 58 N. Y. 627; Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, 5 L. ed. 221; Ronkendorff v. Taylor, 29 U. S. (4 Pet.) 349, 7 L. ed. 882; Clarke v. Strickland, 2 Curt. C. C. 439; Miner v. McLean, 4 McLean, 138; Moore v. Brown, 52 U. S. (11 How.) 414, 13 L. ed. 751; Parker v. Overman, 59 U. S. (18 How.) 137, 15 L. ed. 318, reversing Hempst. 692; Ogden v. Harrington, 6 McLean, 418; Bush v. Williams, 1 Cooke, 360; Washington v. Pratt, 21 U. S. (8 Wheat.) 681, 5 L. ed. 714; Mason v. Fear-

son, 50 U. S. (9 How.) 248, 13 L. ed. 125; Thompson v. Carroll, 63 U. S. (22 How.) 422, 16 L. ed. 387; Bradley v. Conner, 5 Cranch, C. C. 615; Harvey v. Tyler, 69 U. S. (2 Wall.) 329, 17 L. ed. 872; Denike v. Rourke, 3 Biss. 39; Walker v. Moore, 2 Dill. 256; Harkness v. Board of Public Works, 1 McArth. 121; LeRoy v. Reeves, 5 Sawy. 102; Gould v. Day, 94 U. S. 405, 24 L. ed. 232.

In an *ex parte* proceeding, as a sale of land for taxes under a special authority, great strictness is required. To divest an individual of his property against his consent every substantial requisite of the law must be complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes to cure any radical defect in his proceedings, and the proof of regularity devolves upon the person who claims under the collector's sale. (Ronkendorff v. Taylor, 29 U. S. 349.) The maxim *caveat emptor* is applied in its utmost rigor.

⁹⁰ Desty on Taxation, 850; Sullivan v. Davis, 29 Kan. 28; Stevens

It is held, however, that the owner of property assessed for taxes should not be caused to suffer by reason of the acts or omissions of the taxing officers.⁹¹

So, if the owner applies at the proper office for a list of taxes standing against his land on the book of the office, and through mistake of the officer an incomplete list is furnished, which he pays, it will be deemed a full payment so far as to invalidate a sale for the taxes omitted by the officer.⁹²

g. *Tax deeds are evidence of what?* It is entirely competent for the Legislature to declare a tax deed *prima facie* evidence that all of the proceedings prior to the sale have been regularly conducted, although it is always competent for the opposite party to show the contrary.⁹³ And it has been held that the Legislature may even go a step further and declare a tax deed *conclusive* evidence of the recitals therein contained.⁹⁴ Such an extreme position cannot be successfully maintained.⁹⁵ The reasons for the exercise of what may appear on superficial glance to be an arbitrary power, are both manifold and conclusive; the various arguments affecting this subject, collated and paraphrased according to their legal effect, would tabulate themselves (1) on grounds of public policy; (2) because without means to enforce the collection of taxes, "government of the people, by the people and for the people" must perish from the earth; (3) because it is in the nature of a penalty against laches and contumacy, and this penalty the law-making power can unquestionably impose in this as in countless other instances; (4) because the trivial sums realized upon such sales afford a perpetual inducement to purchase, and in this way the government can secure the cash to meet its estimated expenses for the fiscal year, (5) because in practical effect it is nothing more than a statute of limitations, as was

v. Williams, 70 Ind. 536; Cooley on Taxation, 572; Peebles v. Pittsburgh, 101 Pa. 304.

⁹¹ Baird v. Cahoon, 5 Watts & S. 540.

⁹² Breisch v. Coxe, 81 Pa. 336; Jiska v. Ringgold Co. 57 Iowa, 630.

⁹³ Knox v. Cleveland, 23 Wis. 245; Allen v. Armstrong, 16 Ia. 512; Gwyne v. Neiswanger, 18 Ohio, 406;

Peo. v. Mitchell, 35 N. Y. 557; Stewart v. Corbin, 25 Ia. 146.

⁹⁴ Hopkins v. Ladd, 35 Ill. 178; Tyler v. Peo, 8 Mich. 320; Ross v. Whitman, 6 Call. 351; Perham v. Decatur Co. 9 Ga. 352; McMillian v. Lee Co. 6 Ia. 391.

⁹⁵ See Blackwell, Tax Titles, p. 100.

held by the Supreme Court of Wisconsin in *Smith v. Cleveland*, 17 Wis 556.

h. *Typical legislation on the subject.* As typical of the statutory regulations in this country by virtue of which tax deeds are received in evidence, and are endowed with certain attributes, which raise presumptions in their favor, I quote the following provisions from the Revised Statutes of Colorado, chap. 94, 121, Laws of 1883. The provisions were enacted after similar regulations had been in vogue in various States, and whatever infelicities may have disclosed themselves in the earlier legislation, had been thoroughly ventilated in innumerable actions, and had resulted in a mass of judicial interpretation, comment and suggestion, available as data from which an ideal statute could be framed. After exhaustive research, the following provisions are believed to embody the best features of recent legislation on this subject, and may serve to disclose the legislative intent upon a topic which is by no means free from obscurity.

Tax deed shall be signed by the treasurer in his official capacity, and attested by his official or private seal, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, and interest and claim of the State and county thereto, and shall be *prima facie* evidence in all courts of this State in all controversies and suits in relation to the rights of the purchaser, his heirs and assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed.
2. That the taxes were not paid at any time before the sale.
3. That the real property conveyed had not been redeemed from the sale at the date of the deed.
4. That the property had been listed and assessed at the time and in the manner required by law.
5. That the taxes were levied according to law.
6. That the property was advertised for sale in the manner and for the length of time required by law.

7. That the property was sold for taxes as stated in the deed.

8. That the grantee named in the deed was the purchaser or the heir-at-law, or the assignee of such purchaser.

9. That the sale was conducted in the manner required by law.

i. *All formalities must be complied with.* Evidence is competent in all instances to show substantial compliance with the mandatory provisions of a statute, by virtue of which a sale of real property has been effected, for the purpose of satisfying a tax imposed. Evidence of this character may have for its object proof that the successive steps of the statutory proceedings have been observed and complied with — that all formalities exacted have been adhered to, and that every prerequisite necessary to the formal investment of the State's grantee, with the muniments of title have been strictly followed. Further, it must appear that the due execution of the tax deed was made by the properly authorized official."

It would transcend the province of legislative power to place an arbitrary and conclusive effect upon a tax deed offered in evidence. Such an attempt would contravene guaranteed constitutional rights, and, as Judge Cooley has sententiously phrased it, "there is no power in any American legislature to deprive one of his property by making his adversaries' claim to it, whatever that claim may be, conclu-

⁹⁶ *Minturn v. Smith*, 3 Sawy. 142; *Stead v. Course*, 8 U. S. (4 Cranch) 403, 2 L. ed. 660; *Parker v. Rule*, 13 U. S. (9 Cranch) 64, L. ed. 685; *Thatcher v. Powell*, 19 U. S. (6 Wheat.) 119, 5 L. ed. 221; *Pillow v. Roberts*, 54 U. S. (13 How.) 472, 14 L. ed. 228; *Parker v. Overman*, 59 U. S. (18 How.) 142, 15 L. ed. 319; *Little v. Herndon*, 77 U. S. (10 Wall.) 26, 19 L. ed. 878; *Miner v. McLean*, 4 McLean, 138; *French v. Patterson*, 61 Me. 203; *Cahoon v. Coe*, 57 N. H. 556; *Cummings v. Holt*, 56 Vt. 384; *Woodridge v. State*, 43 N. J. L. 262; *Stevens v. Palmer*, 10 Bosw. 60; *Sharp v. Speir*, 4 Hill,

76; *Tallman v. White* 2 N. Y. 66; *Polk v. Rose*, 25 Md. 153; *Jordan v. Rouse*, 1 Jones, L. 119; *Sutton v. Calhoun*, 14 La. Ann. 209; *Robson v. Osborn*, 13 Tex. 298; *Devine v. McCulloch*, 15 Id. 488; *Thompson v. Gotham*, 9 Ohio. 170; *Doe v. McQuilkin*, 8 Blackf. 335; *Mason v. Roe*, 5 Id. 98; *McEntire v. Brown*, 28 Ind. 347; *Barnes v. Doe*, 4 Id. 132; *Chicago v. Wright*, 32 Ill. 192; *Scammon v. Chicago*, 40 Id. 146; *Scott v. Babcock*, 3 G. Greene, 133; *Fitch v. Casey*, 2 Id. 300; *Morton v. Reeds*, 6 Mo. 64; *Nelson v. Goebel*, 17 Id. 161; *Bucknall v. Story*, 36 Cal. 67.

sive of its own validity.”⁹⁷ The same distinguished jurist says: “In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs.” A statute, therefore, which should make a tax deed conclusive evidence of a complete title and preclude the owner of the original title from showing its validity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.”

j. *Correction of tax deeds.* There have been strenuous advocates of the theory that a tax deed once issued, cannot be reformed or corrected. This position is untenable. The theory that a public officer, in the discharge of a public duty, to secure a public benefit, can, through ignorance or inadvertence, or excusable mistake, frustrate the intentions of the Legislature, is a fallacy, and the practitioner will do well to consult *White v. Winnie*, 19 Wis. 304; a case which holds that where the tax deed first issued to the legal owner of a tax certificate is fatally defective in form, he may demand of the officer a new tax deed in proper form, and if he refuses to execute it, a resort to *mandamus* may dispel his illusions “*eo instanti*.” This principle received further vindication in the case of *Gibson v. Baily*, 9 N. H. 168; a case which holds it to be “settled law” that such amendments can be made as will conform to the “truth and the fact.”⁹⁹

k. *The right to redeem.* If, with a view to redeem the real estate sold under and by virtue of a tax levy, a party in good faith applies to the proper officer and pays the amount demanded by him as a redemption of the premises, and the amount is accepted, it is in fact a redemption, and a deed thereafter issued to another party is void. This proposition

⁹⁷ Cooley, Taxation, 521.

⁹⁸ Cooley, Const. Lim. 368. These views meet with judicial endorsement in the following cases: *Abbott v. Lindenbower*, 42 Mo. 162; *Wright v. Cradlebaugh*, 3 Nev. 349; *Virden v. Bowers*, 55 Miss. 1; *Baker v. Kelley*, 11 Minn. 480; *Oliver v. Robinson*, 58 Ala. 46; *Groesbeck v. Seeley*, 12 Mich. 329;

Dickerson v. Acosta, 15 Fla. 614; *Doe v. Minge*, 56 Ala. 121.

⁹⁹ See *Finley v. Brown*, 221a, 538; *Maxcy v. Clabaugh*, 1 Gilm. (Ill.) 26; *Harper v. Sexton*, 221a, 442; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; and especially read *Titles*, 372, and especially read *McCready v. Sexton*, 29 Ia. 356, op. by Ch. J. Cole.

is in no way affected by the fact that the officer was mistaken as to the amount due.¹⁰⁰

The right to redeem a title of lands sold for taxes is one commonly reserved, and the right is favored by the policy of the law.¹⁰¹

TITLE BY PURCHASE—(Continued.)

Art. V. Accretion and alluvion.

Title by accretion and alluvion. It is difficult to understand how this title ever became fastened upon the law of real property. It is in no sense a mode of acquiring land, but properly an incident to real property. No title passes; no prescriptive right intervenes; no Statute of Limitation raises a bar; no estoppel can be invoked. Then why speak of it as a title? However, "we are not confronting a theory, but a condition." And as long as text writers, commentators, and judges, persist in speaking of accretion as a mode of title, it is not for the present writer to obtrude finical objections to the term.

All islands, sand beds, or other particles of agglomerated or concreted earth which newly arise in rivers, or congregate to their banks by alluvion, reliction, or other aqueous means, belong to the owners of the neighboring estates.¹⁰²

The general rules of alluvion apply where the formation is due to artificial causes.¹⁰³ Alluvion formed on the shore of a navigable river belongs to the shore owner.¹⁰⁴

The Code Napoleon defines alluvion as an accretion, which forms by imperceptible degrees on land bounded by a river.¹⁰⁵

¹⁰⁰ *Bubb v. Tompkins*, 47 Pa. St. 359; *Corning Town Co. v. Davis*, 44 Ia. 622; *Burroughs on Tax*, 360; *Cooley on Tax*, 540. And particularly upon this point see *Deitrick v. Mason*, 57 Pa. St. 40.

¹⁰¹ *Dubois v. Hepburn*, 10 Pet. 1; *Corbett v. Nutt*, 10 Wall. 464 (77 U. S. XIX. 976); *Gault's Appeal*, 33 Pa. 94; *Rice v. Nelson*, 27 Iowa, 148; *Schenk v. Peay*, 1 Dill. 267; *Masterson v. Beasley*, 3 Ohio, 301;

Jones v. Collins, 16 Wis. 594; *Curtis v. Whitney*, 13 Wall. 68 (80 U. S. XX. 513).

¹⁰² *Schultes' Aq. Rights*, 138.

¹⁰³ *Godfrey v. City of Alton*, 12 Ill. 37; *Halsey v. McCormick*, 18 N. Y. 149; *Lockwood v. N. Y. & H. R. R. Co.* 37 Conn. 387.

¹⁰⁴ *Stephenson v. Goff*, 10 Rob. 99; *S. C.* 43 Am. Dec. 171.

¹⁰⁵ *Code Civil*, title II, sec. 556.

Reliction differs from alluvion in this: That the former is applied to land made by the withdrawal of the waters by which it was covered. The withdrawal of the waters must be slow, gradual and imperceptible. The same general rules apply to it as to alluvion.¹⁰⁶

Avulsion is alluvion or dereliction of land which is sudden and considerable. As, where the course of a river is changed by a violent flood and thereby a man loses his ground; in which case he has, as his recompense, what the river has left in another place.¹⁰⁷

The common law as to non navigable rivers has adopted the civil law, and according to it, an accretion is an addition of soil by gradual deposition, through the operation of natural causes, to the real estate already in possession of the owner.¹⁰⁸

From the foregoing summary we deduct two points:

1. The accretion must be produced by natural means and not by artificial ones, particularly if such artificial ones are made by other than the riparian owner.

2. It must be clear and apparent by the grant, that the land to which an accretion is claimed was actually bounded by the river.¹⁰⁹

In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite to avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an

¹⁰⁶ Murray v. Sermon, 1 Hawks, 56; Warren v. Chambers, 25 Ark. 120; S. C. 4 Am. Rep. 23; Boorman v. Sunnuchs, 42 Wis. 235.

¹⁰⁷ Anderson's Law Dic. tit. "Avulsion." Citing 2 Bl. Com. 262; 3 Washb. R. P. 452.

¹⁰⁸ 2 Washb. Real Prop. sec. 551; 1 Bouv. Law Dict. tit. "Alluvion," 94; 3 Kent, 428; Ang. Water-Courses, sec. 53.

¹⁰⁹ Ang. Water-Courses, as to river boundaries, secs. 11, 15, 16, 18, 20, 23.

inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "*qui sentit onus debet sentire commodum*" lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not overflow their banks, and where dykes and other defenses are, and where they are not necessary to keep the water within its proper limits.¹¹⁰

TITLE BY PURCHASE — (*Continued.*)

Art. VI. Escheat — Confiscation.

A. *Title by escheat.* No one can be so unreasonable as to quarrel with the proposition that the State should take all realty, where there is no other owner. Such title depends, usually, upon positive statute; but every State in the American Union has provided for a reversion of property in case of a default of heirs. The term is of feudal extraction, but it has lost all of its feudal suggestiveness to the modern student in the law of tenure. To perfect the title the State, at the instance of its attorney-general, institutes and carries on in the name of the people a process known as an "inquest of office," or "office found." And on the conclusion of this process, the State becomes invested with whatever title the intestate had. It takes, not in the capacity of the heir — the State has no inheritable blood — it is in no sense "of kin" to the late lamented. Its only excuse for taking is because there are no heirs.¹¹¹

B. *Title by confiscation.* By the process of confiscation the general government does not obtain an unqualified fee

¹¹⁰ 3 Washb. R. Prop. 48; Munic. No. 2 v. Orleans Cotton Press, 18 La. 122.

¹¹¹ Crane v. Reeder, 21 Mich. 24; Matter of Desilver, 5 Rawle, 111;

Commonwealth v. Hite, 6 Leigh. 588. Also 4 Kent's Com. 487; Hubbard v. Goodwin, 3 Leigh. 492; Matthews v. Ward, 10 Gill. & J. 443.

in the real estate of the party offending — but only a life interest — upon the death of the offender his heirs are entitled to the fee. In other words it is only a life interest that the government acquires, and even this interest is subject to all equities in the way of lien or mortgage that were in good faith impressed upon the land prior to the confiscation. (*French v. Wade*, 102 U. S. 132; *Wallach et. al. v. Van Riswick*, 92 U. S. 202.) In this country our law knows nothing of attainder of blood. The Federal Constitution is explicit on this point. “No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted,” and “no state shall pass any bill of attainder.” The phrases in quotation are familiar passages from the Constitution of the United States.

As to the scope and effect of the confiscation act see *Wallach v. Van Riswick*, 92 U. S. 202; *Semmes v. U. S.*, 91 U. S. 91. The *Wallach case*, *supra*, contains an especially valuable opinion from Mr. Justice Strong, illuminative of the celebrated confiscation act of 1862, which provided that after an adjudicated forfeiture and sale of an enemy's land no interest whatever remained which can be the subject of a conveyance.

TITLE BY PURCHASE — (*Continued.*)

Art. VII. Occupancy.

Title by occupancy. In a primitive condition, while the country was just emerging from a wilderness, it may well be that title by occupancy was of some importance, and merited a discussion in any work pertaining to real property. But conditions have radically changed. Squatter sovereignty is no longer recognized, and the title to all our lands rests either with the government or some individual or corporate body. There may be stray instances where such a title would force itself upon the notice of the courts. But this is extremely doubtful. If the occupancy takes the form of adverse possession, or if it continues for such a period of time as to invoke the protection of the Statute of Limitations, we have in such a case, what is known and recognized in legal nomenclature as title by limitation, or adverse possession, or prescription, or, possibly, by estoppel. But it is not strictly

title by occupancy — a phrase that imported, when such title was in vogue, simply and purely the title of an occupying claimant without the least color of title whatever. It was merely a *replica* of Rob Roy's good old plan, that "they may take who have the power, and they may keep who can."¹¹² Further comment is unnecessary and we are not permitted to broaden the field of inquiry the meager results of such an investigation.

TITLE BY PURCHASE — (*Continued.*

Art. VIII. Public grant.

- SEC. 368. Nature and scope of pre-emption rights.
 369. Notice of claim must be filed.
 370. What lands are subject to pre-emption.
 371. What constitutes entry.
 a. When it takes effect.
 372. What is "patent for land."
 373. Certificate of entry and receiver's receipt.
 374. When pre-emption rights become vested interest.
 375. Patent may be vacated for fraud.
 376. Liberal policy of the government respecting public domain.

§ 368. **Nature and scope of pre-emption rights.** By the laws of the United States the right given to settlers of public lands, to purchase them in preference to others, is called the pre-emption right. This right is founded upon actual settlement, improvement and a continuous residence.¹¹³ But non-residence may be excused if occasioned by well founded apprehension of violence — such as Indian raids, epidemics or enlistment in the service of the State or nation, to repel an actual or threatened invasion.¹¹⁴ So forcible invasion of premises already settled upon and improved and enclosed will establish no right.¹¹⁵

§ 369. **Notice of claim must be filed.** The pre-emptor must file due notice of his claim in the nearest land office within three months after the plat or the survey is returned to the land office, whereupon the officials of the land office issue a

¹¹² See Walker's Am. Law, sec. 155; Tiedeman on Real Prop. sec. 681.

¹¹⁴ *Bohall v. Dilla*, 114 U. S. 47.

¹¹⁵ *Trenouth v. San Francisco*, 100 U. S. 251.

¹¹³ *Hosmer v. Wallace*, 97 U. S. 575.

certificate of entry which may be regarded as an inchoate title. This title is sufficient to maintain an action of ejectment against any person not invested with a better one.¹¹⁶ No adverse claimant appearing within the statutory time, the United States patent issues, which is regarded as a fee simple to the land.¹¹⁷ This case last cited is the celebrated *Yosemite Valley case*.

§ 370. What lands are subject to pre-emption. The right of pre-emption attaches only to such public lands as are subject to the operation of the general land system of the country, and not to those which have by the act of Congress been taken out of the class of public lands and appropriated to specific objects, or reserved for particular purposes, as for the cultivation of the vine and olive.¹¹⁸

§ 371. What constitutes "Entry." The term entry, as applied to appropriations of land, has a signification in the legal nomenclature of the country as fixed and definite as that of many terms borrowed from the common law. It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of the several States by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices under the acts of the United States. In the natural progress of language, this term has been introduced into the laws of the United States, and is distinctly confined to the appropriation of lands, under the laws of the United States, at private sale.¹¹⁹

The original entry may be in any name appropriated by the party making the entry.¹²⁰ The term entry covers a homestead and townsite entry as well as a private entry.¹²¹ And the right to remain on the public land in order to perform these prerequisites is distinctly given by law.¹²²

¹¹⁶ Callahan v. Davis, 90 Mo. 78;
Lansdale v. Daniels, 100 U. S. 113.

¹¹⁷ Hutchings v. Low, 82 U. S. 77.

¹¹⁸ 3 Op. Attorney-General, 456.

¹¹⁹ Supreme Ct. (1827), Chotard v. Pope, 12 Wheat. 586.

¹²⁰ Long v. McDow, 87 Mo. 197.

¹²¹ Denny v. Dodson, 32 Fed. Rep. 899.

¹²² U. S. v. Waddell, 112 U. S. 76.

a. *When it takes effect.* After lands have been entered at the land office, and a certificate of entry issued, they cease to be public. By the entry and the giving of the certificate, they are separated from the mass of public lands, and become private property.¹²³

§ 372. What is "Patent for land." Patent for land is simply a deed or conveyance emanating from either the Federal government or from the State and purports to convey some certain tract of the public domain to the grantee named. The various "land offices" designated by the Department of the Interior, supervise the preliminaries of the application for a patent from the general government which must be strictly in accordance with the statutory methods indicated by the various congressional enactments declaratory of the process. So in cases where the patent originates with the State — as distinguished from the national government — all the proceedings must substantially conform to the requirement imposed by the Legislature.

It is the highest evidence of title, and conclusive as against the government and all persons claiming under junior patents or titles until set aside or annulled by some judicial tribunal. A bill in chancery is the most convenient remedy to annul a patent; which may be done for fraud in the patentee; for mistake or want of authority in the officer or because of a higher equity in another claimant.¹²⁴

§ 373. Certificate of entry and receiver's receipt. Certificates of entry are not conclusive but preliminary only and subject to review by the officers of the Interior Department of the general government.¹²⁵ The question of title is controlled entirely by the rules and decisions of the general land office.¹²⁶ The title once duly acquired is capable of alienation at the pleasure of the owner.¹²⁷

A receiver's receipt issues to the claimant upon the payment of the consideration for the land, usually a trifling sum

¹²³ Witherspoon v. Duncan, 4 S. 316; Langdon v. Sherwood, 124 Wall. 210. Id. 74; Copp, Land Owner, 17, 181.

¹²⁴ United States v. Stone, 2 Wall. 535. ¹²⁶ Quinby v. Conlan, 104 U. S. 420.

¹²⁵ Harkness v. Underhill, 66 U. ¹²⁷ Close v. Styvesant, 132 Ill. 607.

varying from one dollar to one dollar and a half per acre. It contains a description of the premises or land granted, describing it as a mill site, timber claim, mining lode, claim placer, claim or agricultural lands, as the case may be.

§ 374. When pre-emption rights become vested interests. The power of Congress over the land ceases when all the preliminary acts, prescribed for the acquisition of the title have been performed by the settler. Then the settler's interest is vested, and he is entitled to a certificate of entry from the local land office, and, ultimately, to a patent from the United States. Until such entry, the settler has only a privilege or preference of pre-emption in case the lands are offered for sale in the usual manner. The United States only declare by the pre-emption laws that if lands are thrown open for sale, the preference of sale, in limited quantities, shall be in the first person who settles and improves them.¹²⁸

§ 375. Patent may be vacated for fraud. The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States as a landed proprietor, stands upon the same footing with the private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law has been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof. In several cases recently before this court the character and degree of proof required to set aside a patent for land of the United States issued in due form by their officers, where they have had jurisdiction over the subject and have observed the various proceedings preliminary to its issue required by law, have been discussed and determined, and rules laid down which must control in future cases of the kind.¹²⁹

¹²⁸ The Yosemite Valley Case, 15 Wall. 77 (1872), cases, Field, J.

¹²⁹ Maxwell Land Grant Case, 121 U. S. 325.

One obtaining a patent to land from the United States by fraud towards another, or who affects himself with the trust, holds the title thus acquired for the benefit of those who have been injured by his conduct.¹⁸⁰

§ 376. **Liberal policy of the government respecting the public domain.** The policy adopted by the United States was that of giving the lands to actual settlers, at a price per acre barely sufficient to pay the cost of survey and of the land department, surveying the lands on lines corresponding to the four cardinal points of the compass, so that the exact location of all lands for transfer, occupancy, or search of title could be expressed by a brief formula. This was done by running a meridian line north and south through some arbitrary point selected for convenience, then a base line east and west through the same point. One point of this kind exists in Ohio, and the meridian line which runs through it is called the first principal meridian, or in the language of conveyancing "1st P. M." The second principal meridian line is in Indiana, the third makes its point of intersection with the base line at Vandalia, Illinois, the fourth in Western Iowa, etc. Lines drawn parallel to the meridian line at intervals of six miles, whether eastward or westward, are called ranges, those to the eastward being range 1, 2, 3, etc., east, those to the westward being range 1, 2, 3, etc., west of the meridian. Lines drawn parallel with the base line, whether to the northward or southward of it, become township lines, since the intersection of each with the meridian lines marks a plot six miles square, which is the township of the land surveyors. In fact, also, the organization of the people into townships usually follows these lines. The location of the township, east or west of the meridian, is designated by the range number, and its location north or south of the base line by the township number. Thus, T. 38,

¹⁸⁰ Groves v. Fulsome, 16 Mo. 543, 57 Am. Dec. 247; Lewis v. Lewis, 9 Mo. 182; Bird v. Ward, 1 Id. 398, 13 Am. Dec. 506; Lindsey v. Hawes, 67 U. S. (2 Black), 554 (16: 265); Garland v. Wynn, 61 U. S. (20 How.) 6 (15: 801); Stark v. Starr, 73 U. S. (6

Wall.) 402, 419 (18: 925, 930); White v. Cannon, 73 U. S. (6 Wall.) 443 (18: 923); Rogers v. Brent, 10 Ill. 573, 50 Am. Dec. 422. See, generally, "Morrison's Mining Rights" (6th ed.), *passim*.

N. R. 14 E. of 3 P. M. in Cook county, Ill., designates a township, being the 38th to the northward of the base line, in the range (of townships) which are on the meridian line the 14th eastward from the 3d principal meridian. Each township is divided by similar parallel lines into 36 sections.

The sections proceed by halving and quartering, or otherwise, until the definite plot, however small, is reached. Property worth millions may be thus described as lot 44 and N. 1-2 of lot 43, in block 2, Lockwood's subdivision of south half of W. 1-2 of N. E. 1-4 of N. W. 1-4 of section 3, T. 38 N. R. 14 E. of 3 P. M. The starting point of this description is at Vandalia, yet the land which it accurately describes is near Chicago.¹³¹

TITLE BY PURCHASE — (*Continued.*)

Art. IX. Private grant — deeds.

SEC. 377. Definition and nature.

378. Formal parts and general requisites.

379. Effect of grant or mortgage of real property adversely possessed.

380. Consideration.

a. Parol evidence to contradict consideration expressed.

381. Sealing.

382. Rules as to acknowledgments.

a. Within the State.

b. In other States.

383. What passes.

384. Delivery and its incidents.

a. Possession and record evidence of delivery and acceptance.

b. Intention largely governs the question of delivery.

c. Delivery in escrow.

385. Description of the premises.

a. General rule of construction.

b. Not void for uncertainty, unless.

c. When map or plat will govern the description.

d. Monuments control courses and distances.

e. Ambiguities removed by evidence *aliunde*.

386. Judicial construction.

a. When deed construed to be a mortgage.

387. Reformation, cancellation, and surrender of deeds.

¹³¹ Denslow's Economic Philosophy, 141.

SEC. 388. Nature and scope of quit-claim deeds.

- a. No longer discredited in New York.
- b. U. S. Supreme Court repudiates its doctrine concerning them.

389. Recording and its incidents.

- a. Policy of the recording law.

390. Nature and scope of covenants.

- a. If against public policy, void.
- b. Five covenants for title.
- c. Collateral warranties discredited.
- d. Construction of covenants in grants of freehold interests.
- e. Seizin.
- f. Quiet enjoyment.
- g. Freedom from incumbrances.
- h. Further assurance.
- i. Warranty of title.
- j. Grantor has not encumbered.
- l. Of covenants that run with the land.

391. Deed-poll.

392. Fraudulent conveyance.

- a. What fraud creates, justice will destroy—not true that fraud never can be presumed.
- b. The statute of 13 Elizabeth.
- c. Comments of Mr. May.
- d. Doctrine of Twyne's case considered.
- e. Direct proof of fraud unnecessary.
- f. Indications of fraudulent transfer.
- g. No length of time can purge a fraud.
- h. Distinction between "void" and "voidable."
- i. Fraudulent intent a question of fact.
- j. Debtor may prefer one creditor over another.

393. The Statute of Frauds in its relation to conveyances.

- a. Extract from the fourth section.
- b. Contracts within the statute not void but voidable.
- c. Does not apply to judicial sales.
- d. The doctrine of part performance—views of Mr. Justice Earl.
- e. Analysis of the "memorandum clause."
- f. Parol evidence not admissible to vary the terms of a written instrument.
- g. Object of the last rule.
- h. Relaxed in case of fraud or mistake.
- i. Three celebrated cases.

§ 377. **Definition and nature.** In general apprehension this term imports a writing under seal which effects a con-

veyance of real property, while in its largest sense it includes a mortgage.¹⁸² Blackstone says: "It is the most solemn and authentic act a man can perform with relation to the disposal of property." A good and sufficient title calls for the usual covenants of warranty. While a good deed means in a covenant, a conveyance sufficient to pass whatever right a party has in the land without warranty or personal covenant, it does not imply the conveyance of a good title.¹⁸³

In the more common and narrower meaning, the term deed signifies a writing under seal conveying real estate. It is substantially the same in extension as a conveyance, except that the word "conveyance" points to the transaction, while the word "deed" points to the form — the instrument.¹⁸⁴

"There is no magical meaning in the word 'conveyance;' it denotes an instrument which carries from one person to another an interest in land."¹⁸⁵

§ 378. **Formal parts and general requisites.** Bouvier says the *formal parts* of a deed for the conveyance of land are,

1. The *premises*, which contain all that precedes the *habendum*, namely the date, the names and descriptions of the parties, the recitals, the consideration, the receipt of the same, the grant, the full description of the thing granted, and the exceptions, if any,

2. The *habendum*, which states what estate or interest is granted by the deed; this is sometimes done in the premises.

3. The *tenendum*. This was formerly used to express the tenure by which the estate granted was to be held; but now that all freehold tenures have been converted into socage, the *tenendum* is of no use, and it is therefore joined to the *habendum*, under the formula to have and to hold.

4. The *redendum* is that part of the deed by which the grantor reserves something to himself, out of the thing granted, as a rent, under the following formula, yielding and paying.

5. The *conditions* upon which the grant is made.¹⁸⁶

¹⁸² Peo. v. Caton, 25 Mich. 391.

¹⁸³ Greenwood v. Ligon, 18 Miss. 617.

¹⁸⁴ Abbott's Law Dict. tit. "Deed."

¹⁸⁵ Lord Cairns, L. C., in Creed-land v. Potter (L. R.), 10 Ch. App. 12.

¹⁸⁶ Bouvier's Law Dict. title Deeds.

6. The warranty is that part by which the grantor warrants the title to the grantee. This is general when the warrant is against all persons, or special, when it is only against the grantor, his heirs, and those claiming under him.¹³⁷

7. The covenants, if any; these are inserted to oblige the parties or one of them, to do something beneficial to, or to abstain from something, which, if done, might be prejudicial to the other.

8. The conclusion, which mentions the execution and the date, either expressly, or by reference to the beginning.

The circumstances necessarily attendant upon a valid deed are the following: 1, It must be written or printed on parchment or paper;¹³⁸ 2, There must be sufficient parties; 3, A proper subject matter, which is the object of the grant; 4, A sufficient consideration; 5, an agreement properly set forth; 6, It must be read, if desired; 7, It must be signed and sealed; 8, It must be delivered; 9, And attested by witnesses; 10, It should be properly acknowledged before a competent officer; 11, It ought to be recorded.

§ 379. Effect of grant or mortgage of real property adversely possessed. A grant of real property is absolutely void, if at the time of the delivery of the deed, such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording; and if there are two or more such mortgages, they severally have preference according to the date of record.

§ 380. Consideration. Every contract must be supported by a valid consideration. And by referring to the principles which govern the law of contract, we can readily ascertain what consideration will support a deed. Briefly, it may be said, that money, marriage, services performed, or rights relinquished, may be viewed as equivalent terms. And the

¹³⁷ See 2 Bouvier, title Warranty.

¹³⁸ Litt. 229, a; 2 Bl. Com. 297.

old mildewed distinction between good and valuable consideration no longer obtains.¹³⁹ The common law dictum that a seal imports consideration still applies. And very generally the consideration may be shown by parol evidence.

a. *Parol evidence to contradict consideration expressed.* In the absence of fraud, parol testimony is admissible to prove total lack of consideration for a conveyance purporting to have been made for a consideration.¹⁴⁰

A deed given in good faith for a valuable consideration recited, without fraud, accident or mistake, cannot be shown by parol to be without consideration.¹⁴¹ Parol evidence is not admissible to show that there was in fact no consideration for a quit claim deed expressing a consideration in money, and that the grantee agreed by parol to hold the lands for the grantor.¹⁴²

As between immediate parties, it is admissible to impeach the consideration of an instrument.¹⁴³ Such evidence ought not to be excluded merely because such consideration was expressed in writing distinct from the contract.¹⁴⁴

§ 381. **Sealing.** Comment under this heading is necessarily very much restricted owing to the fact that the subject is regulated exclusively by local laws, which, though having many elements of similarity, differ in detail. It is impracticable to attempt a co-ordination of these different rules, and we may safely rely upon the intelligence of the practitioner who is charitably presumed to be familiar with the rules in vogue in his own State.

§ 382. **Rules as to acknowledgments.** *Acknowledgment* is the act of a grantor in appearing before a competent officer and declaring in a formal manner that the instrument he produces is his act and deed. The term is also applied to the official certification of this act having been done.¹⁴⁵ This acknowledgment must be appended to every deed or mort-

¹³⁹ 1 Whart. Contr. sec. 497.

¹⁴³ Farwell v. Ensign, 66 Mich.

¹⁴⁰ Gardner v. Lightfoot, 71 Iowa, 600.

577.

¹⁴⁴ Wolf v. Fletemeyer, 83 Ill. 418.

¹⁴¹ Feeney v. Howard, 79 Cal. 525.

¹⁴⁵ Short v. Coulee, 28 Ill. 228.

¹⁴² Salisbury v. Clarke, 61 Vt. 453.

gage before it is entitled to be recorded, and the obvious design is to prevent imposition upon creditors and encumbrancers, as well as to secure the rights of purchasers.¹⁴⁶

In several of the States an acknowledgment of a married woman must be taken before the notary, prothonotary, or magistrate by an examination separate and apart from her husband. This is for the purpose of circumventing fraud and securing a due acknowledgment from her that in the matter of the alienation she acts upon her own free will and thoroughly understands the legal effect of the signature she appends to the instrument.¹⁴⁷

a. *Acknowledgments and proofs within the State.* The acknowledgment or proof of a conveyance of real property within the State may be made at any place within the State, before a justice of the Supreme Court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds.

b. *Acknowledgments and proofs in other States.* The acknowledgment or proof of a conveyance of real property, within the State, may be made without the State, but within the United States, before either of the following officers acting within his jurisdiction, or of the court to which he belongs:

1. A judge of the Supreme Court, of the Circuit Court of Appeals, of the Circuit Court, or of the District Court of the United States.

2. A judge of the Supreme, Superior, or Circuit Court of a State.

3. A mayor of a city.

4. A commissioner appointed for the purpose by the governor of the State.

§ 383. **What passes.** "A grant of any principal thing shall be taken to carry all which is necessary to the beneficial enjoyment of the thing granted, and which is in the power

¹⁴⁶ Lessees of Sicard v. Davis, 6 Fed. Rep. 361; Hittz v. Jenks, 123 Pet. 136. U. S. 301.

¹⁴⁷ See Paxton v. Marshall, 18

of the grantor to convey."¹⁴⁸ Land will pass by a deed which does not contain any description of the land, but which grants only the structure which is erected upon it.¹⁴⁹

§ 384. **Delivery and its incidents.** The delivery of a deed implies a parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally; absolutely, if the effect of the deed is to be immediate and the title to pass or the estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed or made dependent on the happening of some subsequent event. A conditional delivery is and can only be made by placing the deed in the hands of a third person to be kept by him until the happening of the event of which the deed is to be delivered over by the third person to the grantee. But it is an essential characteristic and an indispensable feature of every delivery, whether absolute or conditional, that there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee at the time of the delivery.¹⁵⁰ The delivery of a deed is as essential to the passing of the title to the land described in it, as is the signing of it or the acknowledgment. It is the final act without which all other formalities are ineffectual. To constitute a delivery, the grantor must part with the legal possession of the deed and of all right to retain or regain it. The present and future dominion over the deed must pass from the grantor. And all this must happen in the grantor's lifetime.¹⁵¹

a. *Possession and record evidence of delivery and acceptance.* The possession and record of a deed are *prima facie* evidence of delivery and acceptance,¹⁵² but where the evidence discloses the delivery of the deed in violation of an escrow

¹⁴⁸ Johnson v. Jordan, 2 Met. (Mass.) 239.

¹⁴⁹ Greenwood v. Murdock, 9 Grey (Mass.), 107.

¹⁵⁰ Prutsman v. Baker, 30 Wis. 644.

¹⁵¹ Younge v. Guilbeau, 70 U. S. (3 Wall. 1) 636, 18 L. ed. 262; Cook

v. Brown, 34 N. H. 476; Fisher v. Hall, 41 N. Y. 421; Jackson v. Leek, 12 Wend. 105; Fay v. Richardson, 7 Pick. 91; Alsop v. Swathel, 7 Conn. 503; Hoboken City Bank v. Phelps, 34 Id. 103; 2 Kent's Com. 439; 1 Bouvier, title Delivery.

¹⁵² Brown v. State, 5 Colo. 496.

agreement, such deed can have no force or validity.¹⁵³ No form of words is necessary in the delivery of the deed. If the evidence shows that the grantor has parted with his dominion over it, with the intent that it shall pass title to the grantee, provided the grantee assents to it, either by himself or his agent, such transfer operates to pass a valid title.¹⁵⁴ An admirable discussion of this topic will be found in the case of *Martz v. Eggemann*, 44 Mich. 430.¹⁵⁵

b. *Intention largely governs the question of delivery.* Where the circumstances show unmistakably that one party intended to divest himself of the title, and to invest the other with it, delivery will be considered complete though the instrument still remains in the hands of the grantor.¹⁵⁶ Parol evidence may be resorted to in order to show the delivery of a deed.¹⁵⁷

Intention largely controls the question of delivery and this intent may be shown by the acts and declarations of the party.¹⁵⁸ It may be "actual" — that is, by doing something and saying nothing — or verbal — that is, by saying something and doing nothing.¹⁵⁹

c. *Delivery in escrow.* A deed delivered as an escrow is without the least vitality or effect until the performance of some stipulated condition, either by the grantee or by some other designated person. All rights by virtue of such an instrument are held in abeyance until the second delivery. Until that event, the transaction is incomplete. Nor can any rights attach to the grantor in such a deed, where the custody of it is obtained by fraud or deceit. Indeed, it may be affirmed as a legal postulate that nothing short of the actual performance of the condition agreed upon will give effect to the conveyance in the hands of the grantee. And the depository is wholly powerless, in the absence of express authorization, to waive the performance of the condition. Even his

¹⁵³ *Hamill v. Thompson*, 3 Colo. 518.

¹⁵⁴ *Warren v. Swett*, 31 N. H. 332.

¹⁵⁵ Consult also *Jones v. Lovelass*, 99 Ind. 327; *Miller v. Lullman*, 81 Mo. 311; 1 Rice, Ev. 223.

¹⁵⁶ *Ruckman v. Ruckman*, 32 N. J. Eq. 259.

¹⁵⁷ *Robinson v. Robinson*, 116 Ill. 250.

¹⁵⁸ *Hill v. McNichol*, 80 Me. 209; *Webber v. Christen*, 121 Ill. 91.

¹⁵⁹ *Fain v. Smith*, 14 Ore. 82; *Dwinnell v. Bliss*, 58 Vt. 353; 2 Washb. Real Prop. 578.

voluntary delivery of the document is ineffectual to pass the title.¹⁶⁰

§ 385. **Description of the premises — boundaries.** A description of the premises granted is sufficient, if it identifies the land with reasonable accuracy. If it is true in part that which is false may be rejected and full effect will be allowed to the conveyance if a sufficiently accurate description remains to ascertain its application. Words, and even whole paragraphs, may be ignored, if inconsistent with other recitals of the instrument.¹⁶¹ But when the words of a description can be satisfied, to reject a part would be to give a different interpretation to the form than which the parties have expressed, and therefore intended, and the rule that words may be rejected where they are clearly inconsistent with the rest of the description is not applied.¹⁶²

Specifications as to quantity, after a particular description by courses, distances, boundaries, etc., will be held subject to the controlling part of the description. If the grantee gets the distinct parcel of land bargained for he will not be heard to complain of a deficiency in area in the absence of positive fraud.¹⁶³

a. *General rule of construction.* A general rule of construction in relation to boundaries, and one which is well sustained by the authorities, is thus stated by Judge Gray in a Massachusetts case:¹⁶⁴ "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but where the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary

¹⁶⁰ Calhoun v. Am. Emigrant Co.
93 U. S. 124; Foster v. Mansfield, 3
Met. (Mass.) 412; Watkins v. Nash,
L. R. 20 Eq. 262; 3 Washb. Real
Prop. (5th ed.) 321.

¹⁶¹ Litchfield v. Co. of Webster,
101 U. S. 775; White v. Lunning,
98 Id. 524.

¹⁶² Sampson v. Security Ins. Co.
133 Mass. 49.

¹⁶³ 4 Kent, 466; 1 Story, Eq. sec.
141.

¹⁶⁴ City of Boston v. Richardson,
13 Allen (Mass.), 154.

speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a street, a river, a ditch, a wall, a fence, a tree, or a stake, the center of the thing so running over or standing on the land is the line of boundary of the lot granted."¹⁶⁵

b. *Not void for uncertainty, unless.* A deed or other written contract is not void for uncertainty in the description of the land sold or conveyed if, from the words employed, the description can be made certain by extrinsic evidence of facts, physical conditions, measurements, or monuments referred to in the deed.¹⁶⁶ And thus a defective description of land may be aided by the conduct of the parties, such as that the vendor put the purchaser in possession of the premises intended to be conveyed.¹⁶⁷

It has been held in a well considered opinion by the Supreme Court of the United States, that if the land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void.¹⁶⁸

c. *When map or plat will govern the description.* When lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat.¹⁶⁹

d. *Monuments control courses and distances.* Where the boundaries of land are fixed, known and unquestionable monu-

¹⁶⁵ Motley v. Sargent, 119 Mass. 231.

¹⁶⁶ 1 Devlin, Deeds, sec. 1012; Smith v. Crawford, 81 Ill. 296; Rockafeller v. Arlington, 91 Id. 375; Choteau v. Jones, 11 Id. 300, 50 Am. Dec. 460; Lyman v. Gedney, 114 Ill. 395, 55 Am. Rep. 871.

¹⁶⁷ Purinton v. Northern Illinois R. R. Co. 46 Ill. 297; Ottumwa, C. F. & St. P. R. R. Co. v. McWilliams, 71 Iowa, 164.

¹⁶⁸ Boardman v. The Lessees of Reed, 6 Pet. 545.

¹⁶⁹ Trustees of Schools v. Schroll, 120 Ill. 509; McCormick v. Huse,

78 Id. 363; Miller v. Mendenhall, 8 L. R. A. 89, 43 Minn. 95; Providence Steam Engine Co. v. Providence & S. A. R. Co. 12 R. I. 348; Peck v. Providence Steam Engine Co. *supra*, Hanford v. St. Paul & D. R. Co. 7 L. R. A. 722, 43 Minn. 104; Barker v. Bates, *supra*; Clarke v. Providence, 1 L. R. A. 725, 16 R. I. 337; Hall v. Whitehall, W. P. Co. 4 Cent. Rep. 222, 103 N. Y. 129; Simons v. French, 25 Conn. 346; Wood v. Comrs. of West Boston & C. Bridge, 122 Mass. 394. See *ante*, sec. 193, as to Dedication and Platting.

ments, although neither courses nor distances, nor the computed contents correspond, the monuments must govern.¹⁷⁰ If there are no monuments, the land must be bounded by the courses and distances named in the patent or deed.¹⁷¹

e. *Ambiguities removed by evidence aliunde.* "When, upon application of the description to the land, it is doubtful what was intended, this is a 'latent ambiguity,' and evidence *aliunde* may be given; as where the description gives the line as running to a maple tree marked, and two maple trees are found, either of which would answer the description;" and again, "when the true line has been long doubtful, and conveyances have been made, bounding on the reputed or supposed line or lines of actual holding and possession, and such reputed or supposed line is capable of being shown by proof, such conveyances will have their full effect in passing the land up to such supposed line, though a different line be afterwards fixed by the Legislature as the true line by a declaratory act."¹⁷²

§ 386. **Judicial construction.** In construing a deed, as in construing other contracts, the primary object and duty of the court are to ascertain, and effectuate the intent of the parties, as gathered from a careful perusal of the entire instrument. Having ascertained the intent, the court will carry it into effect, unless by so doing it will contravene some settled principle of law.¹⁷³ Where the intention is clear, too minute a stress is not to be laid upon the signification of words. False English will not vitiate. Disciplined accuracy in grammar is highly commendable—but it is

¹⁷⁰ *Alshire v. Hulse*, 5 Ohio, 534; *Smith v. Dodge*, 2 N. H. 303; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Yates v. Van De Bogert*, 56 N. Y. 526; *Baxter v. Evett*, 7 T. B. Monr. (Ky.) 333; *Call v. Barker*, 12 Me. 325; *Dogan v. Seekright*, 4 Hen. & M. (Va.) 125; *West v. Shaw*, 67 N. C. 489; *Welder v. Hunt*, 34 Tex. 44; *Preston v. Bowmar*, 6 Wheat. 580; *Riley v. Griffin*, 16 Ga. 141; *Moreland v. Page*, 2 Iowa, 139;

Keenan v. Cavanaugh, 44 Vt. 268.

¹⁷¹ *Hammond v. Ridgley*, 5 Harr. & J. (Md.) 254; *Cherry v. Slade*, 3 Murph. (N. C.) 82; *Chinoweth v. Haskell*, 3 Pet. 96; *Drew v. Swift*, 46 N. Y. 204.

¹⁷² *Shaw, J.*, in *Cook v. Babcock*, 7 Cush. 526; *Putnam v. Boyd*, 100 Mass. 58; *Hall v. Davis*, 36 N. H. 569.

¹⁷³ *Lively v. Rice*, 150 Mass. 171.

not a legal requirement. The construction is dependent upon the reading and phraseology of the entire instrument. When other rules fail, the language will be taken most strongly against the grantor, and in placing a construction upon the language, words will be construed, if they are used in both senses, according to their legal significance. If two repugnant recitals appear, the one first in order will control.¹⁷⁴ The court in its effort to fathom the intent of the parties will endeavor to place itself in the position of the parties at the time of the transaction, and with regard to all of the surrounding circumstances.¹⁷⁵

But whether a specific description comes before or after a general designation, it must prevail upon the underlying principle that the law will always demand the production of the highest evidence, and, as between two descriptions, will prefer that which is most certain.¹⁷⁶

A deed should, if possible, be so construed that some effect will be given it. It will be assumed that the parties did not intend that it should be a nullity, and did intend that it should be operative. It will be upheld, rather than defeated.¹⁷⁷

A. A deed absolute on its face may, as between the parties, be construed to be a mortgage. This assertion is sanctioned by a vast array of authority. The decisions so holding will be found collated in 1 Rice Ev. 266-269; Kerr Real Prop. sec. 2071; Pingrey Real Prop. 777; Tiedeman Real Prop. 307; 2 Wash. Real Prop. 44; 1 Beach Eq. Jur., secs. 84, 408; 3 Pomeroy's Eq. Jur. sec. 1196. For the decisions of the United States Supreme Court see, *ante*, p. 794, n.

§ 387. **Reformation, Cancellation and surrender of deeds.** The power and duty of equity to grant reformation or cancellation of deeds and other writings upon parol evidence of the real intention of the parties, and of the mutual mistake by which they have failed to carry out that intention, is constantly stated in more and more unqualified language.¹⁷⁸

¹⁷⁴ 3 Kent, 422.

¹⁷⁵ Cilley v. Childs, 73 Me. 133; Moran v. Leazotte, 54 Mich. 86.

¹⁷⁶ See also 1 Chitty, Cont. (11th ed.) 140; 2 Parson's Cont. 551; 1 Addison, Cont. 182.

¹⁷⁷ 2 Parsons, Cont. 505; Irwin v. Kilburn, 104 Ind. 113; Gano v. Aldridge, 27 Id. 294.

¹⁷⁸ See Broadway v. Buxton, 43 Conn. 282; 2 Pom. Eq. Jur. sec. 866; Story, Eq. Jur. sec. 152; John-

§ 388. **Nature and scope of quitclaim deeds.** Quitclaim implies the surrendering of one's claim or title. In realty transactions it is the name given to a peculiar deed or conveyance which operates in the nature of a release, but contains words and phrases importing a grant. It is effectual to pass any and all the right, title and interest the grantor has in the premises, the operative words being "remise, release, and forever quitclaim." Covenants against encumbrances imposed by the grantor personally are frequently included in quitclaim deeds. It has been said that this particular species of conveyance is always "open to suspicion," but such language is unwarranted. It does imply a doubt as to the extent of the grantee's rights, although if he has in fact a good title, his deed conveys his estate as effectually as a deed of warranty.¹⁷⁹ The United States Supreme Court holds to the rule that one who takes realty under a quitclaim deed is not a "*bona fide*" purchaser without notice—the mere fact that such a conveyance is offered is sufficient to put the purchaser upon inquiry.¹⁸⁰ Under a quitclaim deed the grantor enters into no engagements to protect the grantee against title paramount, or indeed against adverse claims of any kind.¹⁸¹

a. *No longer discredited in New York.* The agitation over the status of a quitclaim deed has been in no sense creditable to the common sense of several judges, and is now likely to allay itself for the balance of recorded time since the New York Court of Appeals in the case of *Wilhelm v. Wilken*, 149 N. Y. 447, has mercilessly riddled the argument that discredited them, and given to such deeds the same attributes of authenticity and character that belong to any qualified agreement. A purchaser under such a deed for a valuable consideration is a purchaser in good faith, and he is not

son v. Taber, 10 N. Y. 319; Bush v. Hicks, 60 Id. 298; Tabor v. Cilley, 53 Vt. 487; May v. Adams, 2 New Eng. Rep. 203; 58 Vt. 74; Chamberlain v. Thompson, 10 Conn. 243; Stedwell v. Anderson, 21 Id. 139; Bunnell v. Read, Id. 586; Knapp v. White, 23 Id. 543; Blake-man v. Blakeman, 39 Id. 320; Cake

v. Peet, 49 Id. 501; Palmer v. Hartford F. Ins. Co. 54 Id. 488.

¹⁷⁹ Kyle v. Kavanaugh, 103 Mass. 359.

¹⁸⁰ May v. LeClaire, 11 Wall. 232; Dickerson v. Colgrove, 100 U. S. 584.

¹⁸¹ See Richardson v. Levi, 67 Tex. 364.

chargeable with notice of any infirmities in the title that do not appear upon the public records, merely from the fact that he has taken the quitclaim deed, or that one appears on his abstract of title.¹⁸²

b. *United States Supreme Court repudiates its former doctrine concerning them.* It is well to note that the Supreme Court of the United States has receded from the doctrine announced in *May v. LeClaire*, 11 Wall. 232, and in the comparatively recent case of *Moelle v. Sherwood*, 148 U. S. 21. I note the following expressive language:

"The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a *bona fide* purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bona fide* purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers."

§ 389. Recording and its incidents. a. *Policy of the Registry Law.* The policy of the Registry Law is that the title and all that affects it should be disclosed by the public records, and upon the theory that it is thus shown, the rule obtains that the purchaser may rely upon the title as it appears of record, and that he will be protected against unrecorded conveyances, outstanding equities, secret liens and conditions of which he has no notice.¹⁸³

¹⁸² Shotwell v. Harrison, 22 Mich. 410; Graff v. Middleton, 43 Cal. 341; Bradbury v. Davis, 5 Col. 264; Brown v. Banner C. Co. 97 Ill. 214, 37 Am. Rep. 105; Cutler v. James, 64 Wis. 173, 54 Am. Rep.

603; Rowe v. Beckett, 30 Ind. 154, 95 Am. Rep. 676; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316. As to Tax Deeds, see *ante*, page 851, *et seq.*
¹⁸³ Williams v. Jackson, 107 U. S. 478, 27 L. ed. 509; Testart v. Belot,

A deed is recorded, in contemplation of law, when it is entitled to registration, and is deposited with the recorder in his office for that purpose, and if, through any fraud or neglect or mistake of the recording officer, the proper notice is not conveyed to a subsequent purchaser or encumbrancer, the misfortune will fall upon the subsequent purchaser; while other courts hold the opposite doctrine, that the onus is on the grantee, who deposits his deed with the recorder to see that every step is taken, and every act done, that is prescribed by the Registry Laws. For collated authorities on this question see *Mangold v. Barlow*, 61 Miss. 597; Wade, Notice, pp. 70-73.

§ 390. **Nature and scope of covenants.** We may crystallize the sense of innumerable decisions by asserting that all covenants are either express or implied, and that any aggregation of words that sufficiently 'discloses the intention of the party to be bound is, in contemplation of law, an express covenant. Again, there is nothing sacramental about these expressed covenants. Assuming that they contravene no rule of law or equity, and are not obnoxious to public policy, the courts will construe them precisely as they would any other agreement, and seek to effectuate the manifest intent of the party. In achieving this they will resort to such methods of construction as will render operative the entire covenant, and it is a cardinal rule of interpretation to follow the reasonable sense of the language employed; while in doubtful instances they will disclose their partiality for the

31 La. Ann. 797; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Hathorn v. Maynard*, 65 Ga. 168; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 289, 113 Ind. 373, 3 Am. Rep. 655; *Newton v. McLean*, 41 Barb. 285; *Cogan v. Cook*, 22 Minn. 137; *Ramsey v. Jones*, 41 Ohio St. 685; *Harrington v. Erie County Sav. Bank*, 2 Cent. Rep. 170, 1 N. Y. 257; *Pancake v. Cauffman*, 5 Cent. Rep. 205, 514 Pa. 113; *Bailey v. Myrick*, 50 Me. 171; *Farmers' & M. Nat. Bank v. Wallace*, 45

Ohio St. 152; *Columbia Bank v. Jacobs*, 10 Mich. 349; *Hart v. Farmers' & M. Bank*, 33 Vt. 252; *Hoyte v. Jones*, 31 Wis. 389; *Newhall v. Burt*, 7 Pick. 157; *Ashbrook v. Roberts*, 82 Ky. 298; *Hullett v. Mutual Ins. Co.* 4 Cent. Rep. 767, 114 Pa. 142; *Wright v. Lassiter*, 71 Tex. 640; *Roll v. Rea*, 11 Cent. Rep. 363, 50 N. J. L. 266; *Doherty v. Stimmel*, 40 Ohio St. 294; *Kearnes v. Hill*, 21 Fla. 185.

covenantee; as, in the case of expressed covenants, they may be entered into without consideration. We shall have made long strides toward the perfect mastery of this topic if we keep clearly in view the foregoing assertions. For three centuries the legal fraternity has been vexed and bewildered by innumerable decisions said to be expository of the law of covenants. But within the last fifty years the American judiciary, thoroughly disgusted with the inhuman vastness of this alleged "exposition" have been formulating pithy and sententious rules that cover the entire subject. And it is the intent of the present writer to classify and exhibit these various determinations in orderly sequence, and entirely ignore a great mass of refined distinctions that have been developed by Mr. Rawle and his satellites with such exasperating ingenuity.

Covenants are recitals contained in a conveyance whereby either party stipulates that certain facts are true, or binds himself to perform certain things, or make good certain averments. Thus the grantor of land may covenant that he has a right to convey or for the grantee's quiet enjoyment, and the grantee may reciprocally covenant to make certain repairs, pay rent at stated intervals, discharge all assessed taxes, etc.¹⁸⁴

It may be said that express covenants are those that are explicitly stated in the body of the instrument. Implied covenants are those that the law raises independently of any statement in the instrument. The first are also designated as covenants in deed; and the latter are known as covenants in law. The simple expression "I covenant," "I agree," "I obligate myself," or any other form of words by which it is apparent that the party intends to be bound, create an express covenant while a covenant may be implied from the use of the term "grant," "bargain and sell," "demise."¹⁸⁵ Joint covenants are those that seek to bind all parties to the covenant that occupy the situation of covenantors, while several covenants bind separately. *A fortiori*, a joint and several covenant, operates upon all or any, at the option of the covenantee.

Implied promises are to be cautiously and not hastily raised.

¹⁸⁴ 2 Bl. Com. 304.

¹⁸⁵ See 4 Kent's Com. 468; *Conrad v. Morehead*, 98 N. C. 34.

What they are was very well stated in *Scranton v. Booth*, 29 Barb. (N. Y.) 174; in *Allamon v. Albany*, 43 Barb. (N. Y.) 36; and in *Booth v. Cleveland Roll. Mills Co.* 6 Hun (N. Y.), 597. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. The courts have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it,¹⁸⁶ and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect.¹⁸⁷

a. *If against public policy, void.* Covenants which contravene public policy are void.¹⁸⁸ Thus, a covenant in restraint of trade generally, though founded on a good consideration, will

¹⁸⁶ *Dermott v. State*, 99 N. Y. 101.

¹⁸⁷ *King v. Leighton*, 100 N. Y. 386.

Note. To symmetrize our notice of covenants it will be necessary to refer to various adjectives that have been from time to time applied to them whenever it is necessary to specifically designate some particular attribute that distinguishes them. For instance, affirmative and negative covenants importing that has been or shall be done or that the same thing shall not be done. Alternative or disjunctive covenants which offer an election between several things. Collateral or connected in some indirect way with the grant itself and opposed to inherent covenants, which last affect the subject of the grant immediately. Concurrent covenants

import something to be performed at the same time similarly. Declaratory covenants are those calling for some specific direction as to the use of property conveyed. Executory covenants, such as are to be performed *in futuro*, while executed covenants are such as have already been performed. Analogy would suggest the indefinite extension of these covenants, but when we find them characterized as "transitive and intransitive," the point of nausea has been reached. Pedantry in its last gasp cannot invent anything so utterly absurd as an intransitive covenant and at the same time claim that it is a term recognized in the law of real property.

¹⁸⁸ See *Bier v. Dozier*, 24 Gratt. (Va.) 1.

not be sustained.¹⁸⁹ But it is otherwise as to a covenant not to trade in a particular place, for a particular time.¹⁹⁰

A covenant not to rent property to a Chinaman is void as against public policy, as violating the 14th amendment to the United States Constitution providing for equal protection of the laws, and as an infraction of the treaty with China guaranteeing to Chinamen in the United States all the rights, privileges, and immunities accorded to citizens and subjects of the most favored nation.¹⁹¹

b. *Five covenants for title.* As commonly reckoned, there are five covenants for title, viz: 1. Covenant for seizin; 2, That the grantor has a perfect right to convey; 3, That the grantee shall quietly possess and enjoy the premises without interruption, called a covenant for quiet enjoyment; 4, The covenant against encumbrances; 5, The covenant for further assurance; 6, Besides these covenants there is another frequently resorted to in the United States, which is relied on more, perhaps, than any other, called the covenant of warranty. See Rawle on Covenants for Title, where the import and effect of these covenants are elaborately and luminously discussed. The covenant of warranty is the most effective of the covenants in American deeds, and, in some of the States, it is the only one in general use.¹⁹²

c. *Collateral warranties discredited.* There is but very scant respect shown by the law or the judges in this country to the old English doctrine of lineal or collateral warranties. Lord Cowper characterized them "as certainly one of the harshest points of the common law." And Mr. Justice Story was equally vehement in condemnation. "The doctrine of collateral warranties is one of the most unjust and indefensible in the whole range of the common law, and in a country like ours would daily work the greatest public mischiefs."¹⁹³ It

¹⁸⁹ Nobles v. Bates, 7 Cow. (N. Y.) 307; Callahan v. Donnolly, 45 Cal. 152; Maier v. Homan, 4 Daly (N.Y.), 168; Oregon Steam Nav. Co. v. Windsor, 20 Wall. 64.

¹⁹⁰ Id.; and see Perkins v. Clay, 54 N. H. 518; Pierce v. Fuller, 8 Mass. 223; Palmer v. Stebbins, 3 Pick. (Mass.) 188.

¹⁹¹ Gandolfo v. Hartman, 49 Fed. Rep. 181.

¹⁹² See Leary v. Durham, 4 Ga. 593, 601; Dickinson v. Hoopes, 8 Gratt. (Va.) 353, 399.

¹⁹³ Sisson v. Seabury, 1 Sumner, 236.

has very generally been repudiated in the United States.¹⁹⁴ There appears to be some lingering survival of the law in Kentucky and Pennsylvania.

d. *Construction of covenants in grants of freehold interests.* In grants of freehold interests in real property, the following or similar covenants must be construed as follows:

e. *Seizin.* A covenant that the grantor "is seized of the said premises (described) in fee simple, and has good right to convey the same," must be construed as meaning that such grantor, at the time of the execution and delivery of the conveyance, is lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenements, hereditaments and appurtenances thereto belonging, and has good right, full power and lawful authority to grant and convey the same by the said conveyance.

f. *Quiet enjoyment.* A covenant that the grantee "shall quietly enjoy the said premises," must be construed as meaning that such grantee, his heirs, successors and assigns, shall and may, at all times thereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the grantor, his heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same.

g. *Freedom from encumbrances.* A covenant "that the said premises are free from encumbrances," must be construed as meaning that such premises are free, clear, discharged and unencumbered of and from all former and other gifts, grants, titles, charges, estates, judgments, taxes, assessments, liens and encumbrances, of what nature or kind soever.

h. *Further assurance.* A covenant that the grantor will "execute or procure any further necessary assurance of the title to said premises," must be construed as meaning that the grantor and his heirs, or successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the premises conveyed by, from, under, or in trust for him or them, shall

¹⁹⁴ 4 Kent's Com. 469, note, 12 Ed.

and will at any time or times thereafter upon the reasonable request, and at the proper cost and charges of the grantee, his heirs, successors and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises thereby granted or so intended to be, in and to the grantee, his heirs, successors or assigns, forever, as by the grantee, his heirs, successors, or assigns, or his or their counsel learned in the law, shall be reasonably advised or required.

i. *Warranty of title.* A covenant that the grantor "will forever warrant the title" to the said premises, must be construed as meaning that the grantor and his heirs, or successors, the premises granted, and every part and parcel thereof, with the appurtenances, unto the grantee, his heirs, successors, or assigns, against the grantor and his heirs or successors, and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and forever defend.

j. *Grantor has not encumbered.* A covenant that the grantor "has not done or suffered anything whereby the said premises have been encumbered," must be construed as meaning that the grantor has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered in any manner or way whatsoever.

1. *Of covenants that run with the land.* Kent states the rule in this language: "The distinction between the covenants that are in gross and covenants that run with the land (and which are covenants real, annexed to or connected with the estate, are beneficial to the owner of it, and to him only), would seem to rest principally upon this ground: that to make a covenant run with the land there must be a subsisting privity of estate between the covenanting parties."¹⁹⁵

Lord St. Leonards (Mr. Sugden) discusses this question at

¹⁹⁵ 4 Kent's Com. 473.

considerable length and reaches the conclusion that the covenant of a stranger to a title does not run with the land.¹⁹⁶

Mr. Justice Finch, in *Mygatt v. Coe*, 142 N. Y. 78, says: "Privity of estate is essential to carry covenants of warranty to subsequent grantees so as to support a right of action by them against the original covenantor whenever evicted by a title paramount to his; that a covenant of warranty made by one having neither title nor possession, and so no estate in the land, *will not run with it into the hands of subsequent grantees*, but will stop where the privity of contract ends, and so at the first or original covenantee; an independent and collateral warrantor — having and transferring no estate in the land, and so in no sense or degree a privy in estate with the subsequent grantees. But privity of estate is not always essential to carry the covenant down the line of successive grantees, and one who conveyed nothing, but covenanted much, like the prior of the covenant who promised perpetual song to the manor chapel, might find his covenant attached to the land, and running with it into hands, and for the benefit, of successive owners. But, while holding and defending this doctrine, Judge Bradley, who wrote the dissenting opinion in *Mygatt v. Coe*, 124 N. Y. 212, did not press the point, or rely upon it as the ground of ultimate decision, but insisted that Coe, the covenantor, was not a stranger to the title, because he joined with his wife as a grantor, and assumed to unite with her in transferring the estate which actually passed."

This view of the case was particularly italicized by Judge Finch on the re-argument of the case last cited (142 N. Y. 78), and his luminous opinion makes it evident that a husband joining with his wife as an ostensible grantor in a conveyance of land which is the sole and absolute property of the wife, thereby binds himself by a covenant that "runs with the land." He is not regarded as a stranger to the title, but his mere joint occupancy with his wife imparts to him a

¹⁹⁶ 2 Sugd. Vend. 716, 718, 719, 51; 1 Taylor, Land and Ten. 8th ed. 721 (7th Am. ed. 168, 170, 171, 173), sec. 261; Lawyers' Reports, Annotated, Book 11, page 651.
pp. 25, 26, 33-35, 38. See Platt, Cov. 461; Chitty, Cont. 12th ed.

qualified form of estate sufficient, at least to give lasting vitality to his covenant. The three opinions of Finch, Follet, and Bradley (dissenting), are an inexhaustible mine of information upon this vexed topic of law.

To the general rule that between the covenantor and covenantee there must be such privity of estate as would formerly have given rise to the rule of tenure, there are in some States well recognized exceptions. Covenants capable of running with an assignment of a present estate in land may, it seems, have that capacity in certain cases, although no estate passes between the covenantor and covenantee at the time of covenant made. The obligation of contracts is, in general, limited to the parties making them. Where privity of contract is dispensed with, there must ordinarily be privity of estate; but justice sometimes even requires that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfillment, not to impose a burden upon an ignorant and innocent third person, but to enable purchasers of land to avail themselves of the benefit to which they are in justice entitled. The character of a covenant of this kind must depend upon the effect of the entire agreement of which it is a part, and, where the benefit and the burden are so inseparably connected that each is necessary to the existence of the other, both must go together. The liability to the burden will be a necessary incident to the right to the benefit.¹⁹⁷

There is no rule of law or consideration of public policy to prevent any landowner from making, by express words, any *covenant* whatever to run with the land, whether it would otherwise do so or not.¹⁹⁸

Mr. Wait tabulates the following covenants which have been held to "run with land:" A covenant by the purchaser of land, not to exercise, or permit to be exercised, any offensive trade upon the premises;¹⁹⁹ a covenant that neither the

¹⁹⁷ See note to Spencer's case, 1 Smith, Lead. Cas. pt. 1, p. 174; Coleman v. Coleman, 19 Pa. 100.

¹⁹⁸ Weyman v. Ringold, 1 Bradf. (N. Y.) 40; Bedell v. Kennedy, 38 Hun, 510; affirmed on other

grounds, 12 Cent. Rep. 191, 109 N. Y. 153.

¹⁹⁹ Barron v. Richard, 3 Edw. Ch. (N. Y.) 96; s. c., affirmed, 8 Paige (N. Y.), 351; and see Jeter v. Glenn, 9 Rich. (S. C.) 374; St. Andrew's Church's Appeal, 67 Penn. St. 512.

grantor nor his heirs shall make any claim to the land conveyed;²⁰⁰ a covenant to save the husband from the wife's claim of dower;²⁰¹ a covenant that the grantor will leave an adjoining strip ten feet wide, "open forever for the public convenience, and the use of the adjoining lots;"²⁰² or by a grantor not to erect, or suffer to be erected, any structure or edifice upon a lot adjoining the lot conveyed.²⁰³ So it is held that a covenant in a conveyance of city lots, that any house which might be erected thereon should be set back a certain distance from the line of the street on which such lots fronted, runs with the land, and binds not only the covenantors but all who derive title through their deed.²⁰⁴

§ 391. **Deed poll.** A deed made by one party only is not indented, but polled or shaved quite even, and is, for this reason, called a deed poll, or single deed.²⁰⁵

It is not, strictly speaking, an agreement between two persons; but a declaration of some one particular person, respecting an agreement made by him with some other person.²⁰⁶

Where a grantee accepts a deed poll, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land, is, nevertheless, an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and by express words, his heirs and assigns.²⁰⁷

²⁰⁰ Fairbanks v. Williamson, 7 Me. 96; and see Trull v. Eastman, 3 Met. (Mass.) 121.

²⁰¹ Gaines v. Poor, 3 Metc. (Ky.) 503.

²⁰² Brew v. Van Deman, 6 Heisk. (Tenn.) 433; and see Dailey v. Beck, Bright (Penn.), 107.

²⁰³ Trustees of Watertown v. Cowen, 4 Paige (N. Y.), 510.

²⁰⁴ Winfield v. Henning, 21 N. J. Eq. 188; see Grigg v. Landis, Id. 494; cited from Wait's Ac. & Def. Vol. II, p. 394, sect. 8.

²⁰⁵ Co. Litt. 299, a.

²⁰⁶ Cruise, Real Prop. 32.

²⁰⁷ See Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.

A decision substantially similar was rendered in *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.²⁰⁸

§ 392. **Fraudulent conveyances.** a. *What fraud creates justice will destroy*—*Not true that fraud never can be presumed.* The rule is universal "whatever fraud creates justice will destroy."²⁰⁹ A conveyance of land without consideration, is conclusively presumed to be fraudulent as against creditors, not only without proof of any dishonest intent, but in opposition to the most convincing evidence that the objects and motives of the parties were fair. When creditors are about to be cheated, it is very uncommon for the perpetrators to call in witnesses to see it done. A resort to presumptive evidence, therefore becomes absolutely necessary to protect the rights of honest men from this as from other invasions. "It is not true that fraud *never* can be presumed."²¹⁰ Creditors are a favored class.²¹¹ It is not necessary that they should show any actual fraudulent intent, as the requisite intent may be inferred from the circumstances of the case.²¹² And it is not material to the inquiry to determine what motive actuated the parties, if the necessary effect of the disposition is to hinder and delay creditors.²¹³ The old distinction between fraud in fact and fraud in law is very attenuated—has in fact entirely disappeared in all cases involving the fraudulent conveyance of real estate. Only show the transaction to be covinous and the courts will rectify matters without the least regard to this hoary fiction. Proof of fraud need not, however, be so complete in equity as in law.

b. *The statute of 13 Elizabeth.* In *Mulford v. Peterson*, 35 N. J. Law, 133, the court said: "The statute 13 Eliz., c. 5, makes utterly void, frustrate, and of no effect, every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, goods, and chattels, or any of them, devised

²⁰⁸ *Maynard v. Moore*, 76 N. C. 158; *Maule v. Weaver*, 7 Pa. St. 329; *Hinsdale v. Humphrey*, 15 Conn. 432; *Georgia Southern Railroad v. Reeves*, 64 Ga. 492.

²⁰⁹ *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 190.

²¹⁰ *Black, Ch. J., in Kane v. Weigley*, 22 Pa. St. 183.

²¹¹ *Fouche v. Brower*, 74 Ga. 251.

²¹² *Cole v. Tyler*, 65 N. Y. 77.

²¹³ *Moore v. Wood*, 100 Ill. 451.

and contrived to delay, hinder, or defraud creditors as against such creditors, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary. By the 27 Eliz., c. 4, conveyances made to defraud subsequent purchasers, are declared void as to persons defrauded. The principles of this statute have been adopted in all the States of the American Union. But although such conveyance is void as regards purchasers and creditors, it is valid as between parties.

c. *Comments of Mr. May.* "The Statute of 13 Elizabeth is directed not only against such transfers of property as are made with the express intention of defrauding creditors, but * * * extends as well to such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interests, to obviate which it has gradually grown into a practice to regard certain acts or circumstances as indicative of a so called fraudulent intention in the construction of the statutes, although perhaps there was, in fact no actual fraud or moral turpitude. It is difficult in many cases of this sort to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law thus pronounces fraudulent upon principles of public policy."²¹⁴

d. *The doctrine of Twyne's Case considered.* In *McCulloch v. Hutchinson*, 7 Watts. (Pa.), 435, Sergeant, J., said: "The statutes on this subject are liberally expounded for the protection of creditors, and to meet the schemes and devices by which a fair exterior may be given to that which is in reality collusive."²¹⁵ "The statute," says Allen, J., "has always had a liberal interpretation, for the prevention of frauds."²¹⁶ The law "loves honesty and fair dealing," and "so construes liberally the statutes to suppress frauds,"²¹⁷ as far as they annul the fraudulent transactions."²¹⁸ As early as *Twyne's*

²¹⁴ May on Fraudulent Conveyances, p. 4.

²¹⁵ See *Cadogan v. Kennett*, 2 Copw. 432; *Gooch's Case*, 5 Rep. 60 (3 Coke, 121); *Allen v. Rundle*, 50 Conn. 31.

²¹⁶ *Young v. Heermans*, 66 N. Y.

383; see *Pennington v. Seal*, 49 Miss. 525.

²¹⁷ Citing *Twyne's Case*, 3 Rep. 8. ob (2 Coke, 212); *Cadogan v. Kennett*, 2 Copw. 432-434.

²¹⁸ *Bishop on Written Laws*, 192.

Case, 3 Rep. 82a, 2 Coke, 219, it was resolved that "because fraud and deceit abound in those days more than in former times, * * * all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."

Twyne's Case has taken deep hold in our law, and the main principles that control the determination of the different phases of fraudulent conveyances can generally be traced to this parent roof. That the case should at this late day be so widely cited and relied upon is conclusive proof that it embodies a forcible exposition of sound and necessary rules affecting covinous transfers, which neither lapse of time nor change in circumstances can supersede. The case attains the same relative prominence as a precedent in the authorities that is accorded to the statute 13 Eliz., c. 5, as a model for modern legislative enactments.

e. *Direct proof of fraud unnecessary.* A fraudulent intent is seldom the subject of direct and conclusive proofs; inferences more or less convincing in their character must of necessity implicate themselves in a greater or less degree with the evidentiary facts the trial of the case develops. One of these inferences, which is frequently of great importance, is that arising from the fact that the debtor has made other fraudulent transfers of his property at or about the time of the transfer in controversy. It follows that evidence calculated to disclose previous or even subsequent fraudulent conveyances is competent, and its rejection is reversible error.²¹⁹

In *People v. Cook*, 8 N. Y. 67, 79, Willard, J., said: "Fraud can never, in judicial proceedings, be predicated of a mere emotion of the mind, disconnected from an act occasioning an injury to some one."

f. *Indications of fraudulent transfer.* The entire tenor of

²¹⁹ 2 Rice, Ev. 976, citing *Christopher v. Covington*, 2 B. Mon. (Ky.) 357; *Crow v. Ruby*, 5 Mo. 484; *Cram v. Mitchell*, 1 Sandf. Ch. (N.Y.) 251, 7 L. ed. 318; *Whittier v. Varney*, 10 N.H. 291; *Van Kirk v. Wilds*, 11 Barb. (N.Y.) 520; *Howe v. Read*, 12 Me. 515; *Ford v. Williams*, 3 B. Mon. (Ky.) 550; *Sarle v. Arnold*, 7 R. I. 582;

Warren v. Williams, 52 Me. 343; *Mower v. Hanford*, 6 Minn. 535; *Summers v. Howland*, 2 Baxt. 407; *Prewit v. Wilson*, 103 U. S. 22, 26 L. ed. 360; *Stockwell v. Silloway*, 113 Mass. 384; *Blake v. White*, 13 N. H. 267; *Guerin v. Hunt*, 6 Minn. 375.

judicial investigation, whenever fraudulent transfers are involved, indicates the pertinency of any evidence calculated to disclose:

1. An unusual term of credit.
2. Threats of either a civil or criminal action.
3. Gross inadequacy of consideration.
4. Allegations of antecedent indebtedness, from husband to wife, father to son.
5. Absence of security for the purchase price.
6. Failure to record the deed.
7. A retention of possession, by the grantor or transferrer.

Proof of any or all of the above tabulated circumstances is competent, and some satisfactory explanation from the parties should be required.²²⁰

It may be further observed that slight proof is necessary to establish proof of fraudulent intent between parties who occupy confidential or fiduciary relations.²²¹

g. *No length of time can purge a fraud.* Lord Erskine said: "No length of time can prevent the unkennelling of a fraud." In *Alden v. Gregory*, 2 Eden, 285, Lord Northington exclaims: "The next question is in effect whether delay will purge a fraud? Never, while I sit here! Every delay arising from it adds to the injustice, and multiplies the oppression."²²²

h. *Distinction between "void" and "voidable."* 1. A fraudulent conveyance of real estate by a debtor is not void as to his creditors, but only voidable. Such conveyance passes all the estate and interest in the land from the grantor to the grantee, and leaves nothing in the debtor to which a judgment lien, or the levy of an execution, can attach. Such estate and interest as the debtor previously had in the land remains in the grantee, until the fraudulent conveyance has been set aside, and the legal title thereby restored and re-invested in the grantor. The fallacy underlying all the decisions holding fraudulent conveyances "void" has been shown by late text writers and judicial decisions.²²³

²²⁰ *Philbrick v. O'Connor*, 15 Or. 15; *Little v. Ragan*, 83 Ky. 321; *Cole v. Terrell*, 71 Tex. 549; *Hickman v. Trout*, 83 Va. 478; *Cooper v. Davidson*, 86 Ala. 368.

²²¹ *Fisher v. Herron*, 22 Neb. 183;

Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; *Fisher v. Bishop*, 10 Cent. Rep. 707, 108 N. Y. 25.

²²² See *Prevost v. Gratz*, 6 Wheat. 497.

²²³ *Wait*, *Fraud. Conv.* p. 564.

No words are more inaccurately used in the books than "void" and "voidable."²²⁴ Void, is held to mean voidable at the suit of creditors.²²⁵ What is only voidable is often called void.²²⁶ A deed is not void which is obtained from the grantor by fraud, but only voidable.²²⁷

i. *Fraudulent intent, question of fact.* The question of fraudulent intent is deemed a question of fact and not of law; and a conveyance or charge shall not be adjudged fraudulent as against creditors, purchasers or encumbrancers, solely on the ground that it was not founded on a valuable consideration.

j. *Debtor may PREFER one creditor over another.* "If a debtor is unable to pay all his debts, he commits no fraud (in the absence of any statutory provision regulating the distribution of insolvent estates), by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. Nor does it make any difference that both creditor and debtor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtor's property by legal process, in satisfaction of their claims. If there is no secret trust agreed upon, or understood, between debtor and creditor, in favor of the former, but the sole object of the transfer of property is to pay or secure the payment of a debt, the transaction is a valid one at common law. The distinction between a transfer of property, made solely by way of preference of one creditor over others, is perfectly legal."²²⁸

§ 393. The Statute of Frauds in its relation to conveyances.

"In dealing with real property it is well to bear in mind that we have upon our books the Statute of Frauds, the chief pur-

²²⁴ Bromley v. Goodrich, 40 Wis. 139, 22 Am. Rep. 685.

²²⁵ Merrill v. Englesby, 28 Vt. 150,

²²⁶ Larkin v. Saffarans, 15 Fed. Rep. 152; see Freeman, Judgm.; Freeman, Executions; Kearney v. Vaughan, 50 Mo. 287; Anderson v. Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235.

²²⁷ Miller v. Sherry, 69 U. S. (2

Wall.) 237, 17 L. ed. 827; Preston v. Cutter, 64 N. H. 461; Jones v. Bryant, 13 N. H. 53.

²²⁸ Cross v. Carstens, 49 Ohio St. 548; Love v. Wells, 25 Ind. 506; Wight v. Geer, 1 Root. 474; Kepner v. Keefer, 6 Watts, 231; Towle v. Larabee, 26 Me. 464; Allen v. Deming, 14 N. H. 133.

pose of which is to regulate the methods of transmitting title to and protect the owners thereof against unfounded claims. The Statute of Frauds was intended for the security of titles, and its beneficial effects ought not to be swept away by parol testimony, except of the clearest and most convincing character." It is a wise and politic enactment and accords with the common experience of mankind, and the tendency of the courts of the present day is strongly in favor of sustaining and enforcing its provisions.²²⁹

a. *Extract from Sec. 4.* The section which peculiarly affects the law of real property is the fourth, where it is enacted, that "no action shall be brought upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

b. *Contracts within the statute not void but voidable.* Contracts within the statute are not void, but merely voidable, and the party to be charged may waive the statute and the contract thereby becomes binding upon him.²³⁰

The Statute of Frauds being a purely personal defense, a contract within the statute is good against all the world until the party to be charged repudiates it.²³¹

c. *Does not apply to judicial sales.* It has been held in New York, that a judicial sale by an officer of the court is not within the statute.²³² An Alabama decision holds that a judi-

²²⁹ *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 285, 1 L. ed. 142; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 132, 1 L. ed. 89; *German v. Machin*, 6 Paige (N. Y.) 289, 3 L. ed. 990; *Wallace v. Long*, 105 Ind. 522.

²³⁰ *Huffman v. Ackley*, 34 Mo. 277; *Kratz v. Stocke*, 42 Mo. 351; *Maybee v. Moore*, 90 Mo. 340; *Aultman v. Booth*, 95 Mo. 385.

²³¹ *Browne*, Stat. Fr. 4th ed. sec.

132; *Davis v. Inscoc*, 84 N. C. 396; *Cooper v. Hornsby*, 71 Ala. 62; *Christy v. Brien*, 14 Pa. 248; *Houser v. Lamont*, 55 Pa. 311, 93 Am. Dec. 755; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Wright v. Jones*, 105 Ind. 17; *Savage v. Lee*, 101 Ind. 514; *Ames v. Jackson*, 115 Mass. 508.

²³² *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200; and see *Emley v. Drum*, 36 Pa. St. 123.

cial sale is taken out of the statute after a decree of confirmation, and by virtue thereof, and not before.²³³ But the memorandum must be sufficient to identify the property sold or it will be invalid.²³⁴

An agreement to procure a conveyance of lands is not within the statute, and admits of proof by parol evidence.²³⁵

d. *The doctrine of part performance*—*Views of Mr. Justice Earl*. The statute, as we have seen, requires that a contract concerning realty shall be in writing. Courts of equity have, however, relaxed the rigidity of this rule by holding that a *part performance* of an oral contract removes the bar of the statute, on the ground that it would be a fraud for a vendor to take advantage from the absence of a written instrument when he has permitted the contract to be partly executed; especially so, where valuable improvements have been made by the vendee.²³⁶ But the acts should clearly appear to have been done solely with a view to the agreement being performed. On this account acts that are merely introductory or ancillary to an agreement are not considered as a part performance, although attended with expense.²³⁷

This doctrine of part performance is of wide acceptance and must commend itself to every equitable consideration as a salutary method of preventing gross injustice. To evoke its application the existence of the parol contract must be shown with reasonable certainty and it must have been so far performed that compensation in damages would be inadequate and a rescission both inequitable and unjust to the performing party.²³⁸

The attitude of modern equity regarding the Statute of Frauds is admirably expressed by a great jurist who, in voicing the opinion of the New York Court of Appeals, employs the following significant language: "It is a mistake to suppose that parol agreements relating to land are more valid in

²³³ Hutton v. Williams, 35 Ala. 593.

²³⁴ Ridgway v. Ingram, 50 Ind. 149, 19 Am. Rep. 706.

²³⁵ Bannon v. Bean, 9 Iowa (1 With.) 493.

²³⁶ Neale v. Neale, 9 Wall. 9.

²³⁷ Warren v. Warren, 105 Ill. 576; Plymale v. Comstock, 9 Oreg. 318; Chitty, Cont. 278; Poll. Cont. 557.

²³⁸ Brown v. Hoag, 35 Minn. 375; Halsey v. Peters, 79 Va. 67.

equity than in law. They are always and everywhere invalid. But courts of equity have general jurisdiction to relieve against frauds; and where a parol agreement relating to land has been so far partly performed that it would be a fraud upon the party doing the acts unless the agreement should be performed by the other party, the court will relieve against this fraud and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such a case, but the fraud. So in reference to parol trusts in lands. They are invalid in equity as well as in law. But in case of fraud, courts of equity will sometimes imply a trust, and will treat the perpetrator of the fraud as a trustee "*ex maleficio*" for the purpose of administering a remedy against the fraud. For the same purpose it will take the trust which the parties have attempted to create and enforce it; and in such a case the fraud, not the parol agreement, gives the jurisdiction.²³⁹ Neither law nor equity will relieve a party from the operation of the statute who has no tangible interest in the property; who has not been prejudiced in any way by acting upon the parol agreement, and has performed no act in the way of part performance. Simply by coming into court with the allegation that the other party is guilty of a fraud, will avail him nothing, as the court will, in such a case, leave them precisely where it found them."²⁴⁰

The rule is well settled that part performance takes a parol agreement for the purchase of land out of the Statute of Frauds.²⁴¹

e. *The memorandum clause.* The memorandum required by the statute must contain all the essential terms of the contract, expressed with such a degree of certainty as to render it unnecessary to resort to parol evidence to deter-

²³⁹ *Wheeler v. Reynolds*, 66 N. Y. 227; and see *Reese v. Wallace*, 113 Ill. 595.

²⁴⁰ *Levy v. Brush*, 45 N. Y. 589.

²⁴¹ *Northrop v. Boone*, 66 Ill. 368; *Tilton v. Tilton*, 9 N. H. 385; *Wiley v. Bradley*, 60 Ind. 62; *Ottenhouse v. Burleson*, 11 Tex. 87; *Stoddert v. Tuck*, 5 Md. 18; *Mayer v.*

Adrian, 77 N. C. 83; *Williams v. Morris*, 95 U. S. 444; *Hobbs v. Wetherwax*, 38 How. (N. Y.) Pr. 390; *Wharton v. Stoutenbargh*, 35 N. J. Eq. 266; *Cannon v. Collins*, 3 Del. Ch. 132; *Green v. Jones*, 76 Me. 563; *Haines v. Spanogel*, 17 Neb. 637.

mine the intent of the parties thereto.²⁴² The memorandum need only to contain the substance and not a detail of all the particulars of the contract.²⁴³ The memorandum or note of the agreement should set forth the promise and the consideration, either by its own contents, or by reference to something extrinsic, by which it may be rendered certain. It should be signed by one of the parties and the name of the other should appear on it.²⁴⁴

It is sufficient if it can be collected from the memorandum that there was a consideration and what it was.²⁴⁵

The words "value received," are sufficient to express a consideration.²⁴⁶

f. *Parol evidence not admissible to vary the terms of a written instrument.* It is an elementary doctrine that parol evidence is not in general admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted, or made in pursuance of a legal necessity. Every jurisdiction in this country, without exception, has given endorsements to the rule stated in the text, and while great misconception and contrariety of view exists as to the nature and scope of the numerous exceptions which have obtained recognition in every State, and have engrafted themselves tenaciously upon the original formula, still it may be affirmed

²⁴² Hagan v. Domestic S. Mac. Co. 9 Hun, 74.

²⁴³ Ives v. Hazard, 4 R. I. 14; McConnell v. Brillhart, 17 Ill. 354; Chase v. Lowell, 7 Gray, (Mass.) 33; Hawkins v. Chace, 19 Pick. (Mass.) 502; Salmon Falls Mfg. Co. v. Goddard, 55 U. S. 14 How. 456, 14 L. ed. 497; Sarl v. Borrdillon, 1 C. B. N. S. 188.

²⁴⁴ Wain v. Walters, 5 East, 10; Stadt v. Lill, 1 Campb. 242, 9 East, 348; Saunders v. Pakefield, 4 Barn. & Ald. 595; Champion v. Plummer, 4 Bos. & P. 252; Wheeler v. Collier, 1 Mood. & M. 123; Jenkins v. Reynolds, 2 Ball & B. 14; Morley v. Boothby, 3 Bing. 107; Lees v. Whitcomb, 5 Bing. 34; Cole v.

Dyer, 1 Crompt. & J. 461; Newbury v. Armstrong, 6 Bing. 201; Bainbridge v. Wade, 16 Q. B. 89; Powers v. Fowler, 4 El. & B. 511; Sears v. Brink, 3 Johns. (N. Y.) 210; Rogers v. Kneeland, 13 Wend. (N. Y.) 114; Peltier v. Collins, 3 Wend. (N. Y.) 459; Egerton v. Mathews, 6 East, 308.

²⁴⁵ Bainbridge v. Wade, 16 Q. B. 89; Steel v. Hoe, 14 Q. B. 431; Rogers v. Kneeland, 10 Wend. (N. Y.) 218; 13 Wend. 114; Laing v. Lee, 20 N. J. L. 337.

²⁴⁶ Watson v. McLaren, 19 Wend. (N. Y.) 557; Douglass v. Howland, 24 Wend. (N. Y.) 35; Day v. Elmore, 4 Wis. 190; Edelen v. Gough, 5 Gill, 103.

without fear of contradiction that whenever the evidentiary facts disclose a pertinent case, the courts with uniform consistency apply in all its rigor the provisions of the law as stated.²⁴⁷

g. *Object of the last rule.* The principal object of the rule under discussion is to protect the honest, accurate and prudent in making contracts, against fraud and false swearing, carelessness and inaccuracy, by furnishing evidence of what was intended by the parties which can always be produced without fear of change, or liability to misconstruction.²⁴⁸

h. *Relaxed in case of fraud or mistake.* It is familiar law in the United States — a law exemplified in the daily proceedings of our courts of record — that where the evidence dis-

²⁴⁷ Rice Ev., citing Eveleth v. Wilson, 15 Me. 109; Peterson v. Grover, 20 Me. 361; Morrill v. Robinson, 71 Me. 24; Smith v. Gibbs, 44 N. H. 335; Bradley v. Bentley, 8 Vt. 243; Brandon Mfg. Co. v. Morse, 48 Vt. 322; Myrick v. Dame, 9 Cush. (Mass.) 248; Finney v. Bedford Commercial Ins. Co. 8 Met. (Mass.) 348; Fay v. Gray, 124 Mass. 500; Drake v. Starks, 45 Conn. 96; La Farge v. Rickert, 5 Wend. (N. Y.) 187; Spencer v. Tilden, 5 Cow. (N. Y.) 144; Clarke v. New York L. Ins. & T. Co. 7 Lans. (N. Y.) 323; Dalrymple v. Van Syckel, 32 N. J. Eq. 826; Perrine v. Cheeseman, 11 N. J. L. 207; Carlton v. Vineland Wine Co. 33 N. J. Eq. 466; Heilner v. Imbric, 6 Serg. & R. 401; Hagey v. Hill, 75 Pa. 108; Weiler v. Hottenstein, 102 Pa. 499; Woodruff v. Frost, 2 N. J. L. 322; Young v. Frost, 5 Gill, 287; Batters v. Sellers, 6 Har. & J. 249; Criss v. Withers, 26 Md. 553; Farrow v. Hayes, 51 Md. 488; Baltimore Perm. Bldg. & L. Soc. v. Smith, 54 Md. 187; Hunting v. Emmart, 55 Md. 265; McLean v. Piedmont & A. L. Ins. Co. 29

Gratt. 361; Little Kanawha Nav. Co. v. Rice, 8 W. Va. 636; Serviss v. Stockstill, 30 Ohio St. 418; Irwin v. Ivers, 7 Ind. 308; Davis v. Liberty & C. G. Road Co. 84 Ind. 36; Trenton v. Fletcher, 100 Ind. 105; Seckler v. Fox, 51 Mich. 92; McClure v. Jeffrey, 8 Ind. 79; Abrams v. Pomeroy, 13 Ill. 133; Belcher v. Mulhall, 57 Tex. 17; Pickett v. Furgeson, 45 Ark. 177; Koehring v. Muemminghoff, 61 Mo. 403; Porter v. Sandidge, 32 La. Ann. 449; Elliott v. Connell, 5 Smedes & M. 91; Tennessee & C. R. Co. v. East Alabama R. Co. 73 Ala. 426; Duff v. Ivy 3 Stew. 140; Smith v. Odom, 63 Ga. 499; Falconer v. Garrison, 1 McCord L. 209; Mayer v. Adrian, 77 N. C. 83; Chamness v. Crutchfield, 2 Ired. Eq. 148; Lemaster v. Burckhart, 2 Bibb. 25; Ruiz v. Norton, 4 Cal. 359; Gillispie v. Sawyer, 15 Neb. 536; Lenard v. Vischer, 2 Cal. 37; Winona v. Thompson, 24 Minn. 199; Schultz v. Coon, 51 Wis. 416; Dickson v. Harris, 60 Iowa, 727.

²⁴⁸ Union Mut. L. Ins. Co. v. Wilkinson, 80 U. S. (13 Wall.) 231, 20 L. ed. 621.

closes fraud or mistake in a written contract sufficient to demand in equity a reformation of the instrument, the process of the court may be set in motion to achieve this end. The complainant in such an action must allege the mistake or fraud relied upon as a ground for modification, reformation or specific enforcement, and his proofs must sustain his allegations. It is further a well recognized principle of the equitable jurisdiction, that parol evidence is admissible to sustain averments of mistake, fraud or unconscionable advantage. The leading case in this country is *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795, decided by Chancellor Kent in 1819. The decision of the celebrated chancellor is placed broadly and squarely upon well recognized equitable principles. The doctrine is either directly decided or recognized by the following cases.²⁴⁹

j. *Three celebrated cases considered.* The three cases of *Keisselbrack v. Livingston*, *Gillespie v. Moon*, 2 Johns. Ch. 585, and *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, should be read consecutively in connection with any extended or discriminating review of this subject. They have been the theme of judicial comment for many years, and the latter case in

²⁴⁹ *Bellows v. Stone*, 14 N. H. 175; *Smith v. Greeley*, Id. 378; *Tilton v. Tilton*, 9 Id. 385; *Craig v. Kittredge*, 23 Id. 231; *Beardsley v. Knight*, 10 Vt. 185; *Glass v. Hulbert*, 102 Mass. 24, 41; *Metcalf v. Putman*, 9 Allen, 97; *Quinn v. Roath*, 37 Conn. 16; *Wooden v. Haviland*, 18 Id. 101; *Chamberlain v. Thompson*, 10 Id. 243; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 1 L. ed. 500; *Lyman v. United Ins. Co.* 17 Johns. 373; *Rosevelt v. Fulton*, 2 Cow. (N. Y.) 129; *Coles v. Browne*, 10 Paige (N. Y.), 526, 535, 4 L. ed. 1076, 1080; *Gouverneur v. Titus*, 1 Edw. Ch. 477, 6 L. ed. 217, 6 Paige, 347, 3 L. ed. 1015; *Hyde v. Tanner*, 1 Barb. (N. Y.) 75; *Smith v. Allen*, 1 N. J. Eq. 43; *Christ v. Dittenbach*, 1 Serg. & R. (Pa.) 464;

Susquehanna Ins. Co. v. Perrine, 7 Watts & S. (Pa.) 348; *Gower v. Sterner*, 2 Whart. 75; *Bowman v. Bittenbender*, 4 Watts, 290; *Clark v. Partridge*, 2 Pa. 13, 4 Id. 166; *Wesley v. Thomas*, 6 Harr. & J. 24; *Moale v. Buchanan*, 11 Gill. & J. 314, 325; *Coutt v. Craig*, 2 Hen. & M. 618; *Newsom v. Bufferlow*, 1 Dev. Eq. 379; *Brady v. Parker*, 4 Ired. Eq. 430; *Clopton v. Martin*, 11 Ala. 187; *Harris v. Columbiana County Mut. Ins. Co.* 18 Ohio, 116; *Webster v. Harris*, 16 Id. 490; *Worley v. Tuggle*, 4 Bush, 168, 173; *Shelby v. Smith*, 2 A. K. Marsh. (Ky.) 504; *Bailey v. Bailey*, 8 Hump. (Tenn.) 230; *Leitensdorfer v. Delphy*, 15 Mo. 160; *Murphy v. Rooney*, 45 Cal. 78; *Murray v. Dake*. 46 Id. 644.

particular, decided by Mr. Justice Wells in 1869, supports with a great display of reasoning a restrictive view that neither of the other cases suggest or enjoin. They have also been made the subject of very elaborate review by Prof. Pomeroy, in his *Equity Jurisprudence*, see *et seq.* 869, and the distinction which underlies the latter case is very clearly indicated in a foot note to that section. The pith and very essence of the principle contended for is this: "The parol evidence is introduced not to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement." The learned Chancellor Kent remarks: "It would be a great defect in what Lord Eaton terms the 'moral jurisdiction' of the court, if there was no relief in such a case."

TITLE BY PURCHASE -- (*Continued.*)*Art. X. Devise or will*

- SEC. 394. What is a devise?
395. The term "will" defined.
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- a. Views of Mr. Jarman.
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401. Codicils and their significance.
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402. Revocation — how effected.
- a. By subsequent marriage and birth of child.
403. Lapsed devises.
404. Nuncupative wills.
405. Probate procedure.

§ 394. What is a devise? The word "devise" simply denotes a testamentary disposition of land, made by the testator, or deviser.²⁶⁰ The devisee is the beneficiary or the party

²⁶⁰ Fetrow's Est. 58 Pa. 427.

to whom the land is devised or given. This term devise, is frequently employed promiscuously, in the sense of "bequeath" or "bequest," terms that in strictness apply to a legacy of personal property. The technical interpretation is always to be preferred unless it is clearly apparent that the testator employed the terms in a different sense. And whenever any person becomes the owner of real property by force, or by virtue of some last will or testament, that person is said to hold a "Title by Devise."

§ 395. The term "will" defined. A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which in its own nature is ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is, in such cases, produced by the express terms, and does not result from the nature of the instrument.

The law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.²⁵¹

The terms "will" and "testament" are synonymous, and they are used indifferently by common lawyers, or one for the other.²⁵² Civilians use the term "testament" only.

§ 396. The five essentials of a will as stated by Judge Bouvier. 1. The testator must be legally capable of making a will. Generally all persons who make valid contracts can dispose of their property by will. This act requires a power of the mind freely to dispose of property. Infants, because of their tender age, and married women, on account of the

²⁵¹ 1 Jarm. 18.

²⁵² 1 Swinb., sec. 1, 5; Bac. Abr., Wills, A.

supposed influence and control of their husbands, have no capacity to make a will — with these exceptions, that infants at common law may dispose of their personal estate, the males when over fourteen years of age, and the females when over twelve. This rule in relation to infants is not uniform in the United States.²⁶³

2. The testator, at the time of making his will, must have *animus testandi*, or a serious intention to make such will. If a man, therefore, jestingly or boastingly, and not seriously, writes or says that such a person shall have his goods or be his executor, this is no will.²⁶⁴

3. The mind of the testator in making his will must be free, and not moved by fear, fraud or flattery. In such cases the will is void, or at least voidable.²⁶⁵

4. There must be a person to take, capable of taking; for to render a devise or bequest valid, there must be a donee *in esse*, or *in rerum natura*, and one that shall have capacity to take the thing given, when it is to vest, or the gift shall be void.²⁶⁶

5. The will must be put in proper form. Wills are either written or nuncupative.

(1) A will in writing must be: 1, Written on paper or parchment; it may be in any language, and in any character, provided it can be read or understood; 2, It must be signed by the testator or some person authorized by him; but a sealing has been held to be a sufficient signing.²⁶⁷ And it ought to be signed by the attesting witnesses. In some States three witnesses are required, who should sign the will as such at the request and in the presence of the testator and of each other. This formality should generally be pursued, as the testator may have lands in such States which could not pass without it.²⁶⁸ It must be published, that is, the tes-

²⁶³ Swinb., p. 2, sec. 2; Bac. Abr., Wills, B.

²⁶⁴ Bac. Abr., Wills, C; Com. Dig. Estates by Devise, D, 1; see 4 Serg. & Rawle, 545; 2 Yeates 324; 5 Binn. 490; 1 Des. 543.

²⁶⁵ Bac. Abr., Wills, C; Serge & Rawle, 269.

²⁶⁶ Plowd. 345.

²⁶⁷ 2 Str. 764; but see 3 Lev. 1; 1 Const. 343; 18 Ves. 183; 2 Ball & B. 104; 5 Mood. 484, and article to sign.

²⁶⁸ See, as to the attestation of wills, Bac. Abr., Wills, D; Rob. on Wills, chap. 1, pt. 15, 3.

tator must do some act from which it can be concluded that he intended the instrument to operate as his will.²⁵⁹ As to the republication of wills, see *Bac. Abr. Wills*, D, 3; and article "Publication."

§ 397. Who may make a will. For centuries we have been asserting in practice and had long before established in theory the right of every man to make a testamentary disposition of his property in such manner as he shall elect, and it is only the most perverted intellect that can fail to see that this right is among the indestructible attributes of the possessory relation. As a general rule all persons who may sell an estate may devise it.

Every man, under the conditions and in the manner prescribed by law, has the right to make a will and dispose of his property in such way and to such persons as shall be most pleasing to him, however absurd, unjust or inequitable the disposition may appear to others. He may do what he will

²⁵⁹ 6 Cru. 79, 4 Burn's Eccl. L. 119.

Under the recitals of the celebrated Statute of Frauds (29 Chas. II, chap. 8, sec. 5), a devise must be attested and subscribed in the presence of the testator by three or four competent witnesses. This attestation may be made by signing only the initials of the name, and the act implies a knowledge of sufficient facts to constitute the due execution of a will—in other words, the witness is presumed to be satisfied that the testator is of sound and disposing mind and memory. (*Scribner v. Crane*, 2 Paige Ch. [N. Y.] 147.) In most of the States but two witnesses are required. The witnesses should be persons of repute and credibility, and the testator should acknowledge his signature in their presence, although they are not obliged to see him sign. In fact, the signing of their names as witnesses of

the testamentary act may be before or after the signing by the testator. Ordinarily, the witnesses should follow the New York rule, and annex to their signatures their business address or place of residence—they should also be entirely disinterested parties, and in no way implicated in the devolution of the property as legatees or devisees or doweress. Hence, a wife is not a competent witness to her husband's will. (*Pease v. Allis*, 110 Mass. 157; see, generally on the subject of attestation, the following authorities: *Rugg v. Rugg*, 83 N. Y. 592; *Will of Maurer*, 44 Wis. 393; *Swift v. Wiley*, 1 B. Mon. 117; *Hans v. Palmer*, 21 Pa. St. 296; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; *Dewey v. Dewey*, 1 Met. (Mass.) 349; *Den v. Mitten*, 12 N. J. L. 70; *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 331; *Withinton v. Withinton*, 7 Mo. 589.

with his own.²⁶⁰ For example, he may give all his property to strangers and thus disinherit his relatives. He may exclude his children or divide his estate among them unequally; and this general power of disposition he possesses down to the last hour of conscious, intelligent existence.²⁶¹ He is not prohibited from indulging, in this regard, his passions, his prejudices or his caprices, and his will is not to be disregarded by the judgment of any tribunal, whether of law or equity, because his dispositions are by them deemed unreasonable, or prompted by passion, prejudice, or unworthy motive.

No man can live so long as to be legally incapacitated by the mere lapse of years from ordering the disposition which shall after his death be made of his estate. Swinburne's enunciation of this doctrine (part 2, sec. 5), is sound law to-day: "A man may freely make his testament, how old soever he may be; for it is not the integrity of the body but of the mind that is requisite."

§ 398. **Who may be devisees.** Without entangling ourselves in an interminable discussion, we may summarize the results of various decisions by saying that any person or corporation may be a devisee. Charities have always been favorites with both law and equity, and a charitable corporation is entitled to the liberal construction of the terms of a devise in order to sustain its right to the testator's bounty.²⁶² As regards individuals the decisions go to the extent of affirming the right of a bastard in *ventre matris* to take real property by this method.²⁶³ And natural children may by parity of reasoning inherit.²⁶⁴ Wives may take from their husbands real estate devised. For the devise does not operate until after the husband's death—an event which dissolves the marriage relation.²⁶⁵

²⁶⁰ Clapp v. Fullerton, 34 N. Y. 190; Seguire v. Seguire, 3 Keyes (N. Y.) 663-671; Reynolds v. Root, 62 Barb. (N. Y.) 250; Wood v. Bishop, 1 Dem. (N. Y.) 512.

²⁶¹ Hollis v. Drew Theological Seminary, 95 N. Y. 166; Horn v. Pullman, 72 Id. 269.

²⁶² Power v. Cassidy, 79 N. Y.

602; Rhymer's App. 93 Pa. St. 142; Simpson v. Welcome, 72 Me. 496; Adye v. Smith, 44 Conn. 60; Girard v. Philadelphia, 7 Wall. 1.

²⁶³ Prett v. Flamar, 5 Harr. & J. 10.

²⁶⁴ Wilkinson v. Adams, 12 Price, 407; but see Gardner v. Hyer, 2 Paige Ch. (N. Y.) 11.

²⁶⁵ 3 Greenl. Cruise, 21.

§ 399. Is the word "heirs" necessary to pass a fee? It is familiar learning that the common law required the presence of the word "heirs" in any instrument purporting to convey the fee to real property. And this rule was brought to this country by our ancestors, and during the colonial era was a familiar incident in all conveyancing. Indeed, it may be said that it is good law to-day, in any jurisdiction where the common law requirements in this respect have not been abrogated by statutory enactments. In the majority of the States, however, express legislation is declared, that the word "heirs" is not necessary to pass a fee. But any other words or expressions on the part of the grantor or testator evincive of an intent to pass an absolute estate will now have the same effect, and the intent is to be gathered from a careful inspection of the entire instrument.²⁶⁶

§ 400. Construction and interpretation of wills. "Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey."²⁶⁷ "The art of interpretation is the art of teaching what is the meaning of another's language; or that skill which enables us to attach to another's language the same meaning that the author has attached to it."²⁶⁸

Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text, conclusions which are in the spirit, though not within the letter, of the text.²⁶⁹ "In the most general adaptation of the term, construction signifies the representing of an entire whole from given elements by just conclusions."²⁷⁰ "Construction and interpretation of wills are not resorted to for the discovery of a testator's intention, when he has used none but plain, unequivocal expressions."²⁷¹

²⁶⁶ Payton v. Smith, 4 McCord, 476; Baker v. Briggs, 12 Pick. (Mass.) 27; Deering v. Adams, 37 Me. 264; Saunders v. Mathewson, 11 Conn. 149.

²⁶⁷ Lieb. Herm., chap. 1, sec. 8.

²⁶⁸ Lieb. Herm., chap. 1, sec. 8 note by Hammond.

²⁶⁹ Lieb. Herm., chap. 3, sec. 2.

²⁷⁰ Lieb. Herm., chap. 3, sec. 4.

²⁷¹ Theall v. Theall, 7 La. Ann. 220.

"Common sense and good faith are the leading stars of all genuine interpretation. Be it repeated, our object is not to bend, twist or shape the text, until at last we may succeed in forcing it into the mold of preconceived ideas, to extend or cut short in the manner of a Procrustes, but simply and solely to fix upon the true intent, whatever that may be."²⁷²

Coleridge, J., in *Shore v. Wilson*, 9 Cl. & Fin. 255, 525, says: "The object of all exposition of written instruments must be, to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention."

a. *Views of Mr. Jarman.* "In the construction of wills," says Mr. Jarman, "the most unbounded indulgence has been shown to the ignorance, unskillfulness and negligence of testators. No degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together."²⁷³ Said Sir John Leach, Vice-Ch., in *Mason v. Robinson*, 2 Sim. & Stu. 295: "In order to avoid a will for uncertainty, it must be incapable of any clear meaning."

b. *Of Baron Parke.* "The construction of all written instruments," says Baron Parke, "belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words which are to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper sub-

²⁷² Leib. Herm. (Hammond's ed.),
chap. 4, sec. 3.

²⁷³ 1 Jarm. on Wills, 315.

ject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all, effectually.²⁷⁴

These views have received repeated vindications in the American courts, and are supported by a formidable array of authority.²⁷⁵

c. *Of Vice-Chancellor Wigram.* Principles of interpretation by Wigram. The rules of interpretations of wills, in Vice-Chancellor Wigram's admirable treatise on the subject, may be safely applied *mutato nomine* to all other probate instruments. They are contained in seven propositions as the result both of principle and authority, and are thus expressed:

Proposition I. A testator is also presumed to use the words in which he expresses himself according to their strict and primary acceptance, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

Proposition II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances,

²⁷⁴ Neilson v. Harford, 8 Mees. & W. 823.

²⁷⁵ Shepherd v. White, 11 Tex. 346; Smith v. Faulkner, 12 Gray (Mass.). 251; Warren v. Jones, 51 Me. 146; Williams v. Waters, 36 Ga. 454; Rogers v. Colt, 21 N. J. L. 704; Parker v. Ibbetson, 4 C. B. (N. S.) 345; Burress v. Blair, 61 Mo. 133; Woodman v. Chesley, 39 Me. 45; Walker v. Bank of Washington, 3 How. (U. S.) 62; Dunn v. Rothernell, 112 Pa. St. 272; State v. Donnelly, 9 (Mo.) App. 520; Spaulding v. Taylor, 1 Id. 34; Higgins v. McCrea, 116 U. S. 671, 682; Gregory v. Underhill, 6 Lea (Tenn.) 207, 211; Collins v. Benbury, 5 Ired. (N. C.) 118; Grady v. Cassidy, 104 N. Y.

147; Wasson v. Rowe, 16 Vt. 525; Illinois Central R. Co. v. Cassell, 17 Ill. 389; Nash v. Drisco, 51 Me. 417; Lapeer Ins. Co. v. Doyle, 30 Mich. 159; Moore v. Miller, 4 Serg. & R. (Penn.) 279; Harris v. Doe, 4 Blackf. (Ind.) 369; Kidd v. Cromwell, 17 Ala. 648; Warner v. Thompson, 35 Kans. 27; Mowry v. Stogner, 3 S. C. 251, 253; Emery v. Owings, 6 Gill (Md.), 260; McKenna v. Railroad Co. 13 Lea (Tenn.), 280, 288. See also Stephen's Dig. Law of Ev. art. 91, and particularly Crystie v. Phyfe, 19 N. Y. 348, where Mr. Justice Strong states the rules applicable to testamentary construction, with rare brevity and precision.

it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

Proposition III. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense of which, with reference to these circumstances, they are capable.

Proposition IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words.

Proposition V. For the purpose of determining the object of a testator's bounty or the subject of disposition or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words.

Proposition VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (ex-

cept in certain special cases; see proposition 7) will be void for uncertainty.

Proposition VII. Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of intention, to make certain the person or thing intended where the description in the will is insufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty or the subject of disposition (i. e., person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of these persons or things so desired was intended by the testator.²⁷⁶ See generally on this subject, chap. 17, *Executory Devises*, *ante*, p. 741.

§ 401. **Codicils and their significance.** In *Beall v. Cunningham*, 3 B. Monr. (Ky.), 390, decided in 1843, Ewing, Ch. J., in delivering the opinion of the court, says: "A codicil is a part of the will to which it is attached or refers, and both must be taken and construed together as one instrument. The codicil recognizes the existence of the original, changing it in part and affirming it in those parts in which it is not altered; and hence it has been well established that a codicil executed with the solemnities required by the statute for passing lands is a republication of a will, and both taken together make but one will, and that such republication will have the effect to pass lands acquired after the date of the will, but before the date of the codicil, or to revive and give force and operation to a revoked will."²⁷⁷

It may be taken as a well settled general rule that a will and codicil are to be construed together as parts of one and the same instrument, and that a codicil is no revocation of a will further than it is so expressed.²⁷⁸

a. *Operate as a republication of the last will.* The codicil

²⁷⁶ See Wigram on Wills, 11-14.

²⁷⁷ Citing Roberts on Wills, 357; Powell on Devises, 610, 620; Wms. on Exrs. 103; 3 Harrison's Dig.

2186, tit. "Wills," and cases referred to in these elementary writers.

²⁷⁸ *Westcott v. Cady*, 5 Johns. (N. Y.) 343.

operates as its republication, and all of the will is presumed to be in the mind of the testator at the execution of the codicil.²⁷⁹

"The effect of a republication, according to all the cases, is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time."²⁸⁰

§ 402. Revocation, how effected. The Massachusetts statute declares: "No will shall be revoked unless by the burning, tearing, canceling or obliterating of the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other writing, signed, attested and subscribed in the same manner that is required in the case of a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."²⁸¹ The provisions of this act are generally recognized in the statutory law of the other States.

"From the date of the revocation, the will ceases to be a testamentary disposition of the maker's estate. * * * And if the party who made it desires to make a testamentary disposition of his estate, he must make a new will in the

²⁷⁹ Jarm. on Wills (5th Am. ed.), 364; *Payne v. Payne*, 18 Cal. 291; *Jones v. Shewmaker*, 35 Ga. 151; *Duncan v. Duncan*, 23 Ill. 364; *Beall v. Cunningham*, 3 B. Monr. (Ky.) 390; *Armstrong v. Armstrong*, 14 Id. 338; 4 *Dane's Abr.* ch. 127, art. 1, sec. 11, p. 550; *Haven v. Foster*, 14 Pick. (Mass.) 534; *Washburn v. Sewell*, 4 Met. (Mass.) 63; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Tilden v. Tilden*, 13 Gray (Mass.), 103; *Hosea v. Jacobs*, 98 Mass. 65; *Snow v. Foley*, 119 Id. 102; *Brownell v. DeWolf*, 5 Mason (Me.), 486; *Van Cortland v. Kipp*, 1 Hill (N. Y.), 590; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 43; *Lynch v. Prendergast*, 67 Barb. (N.

Y.) 504; *Howland v. Un. Theo. Sem.* 5 N. Y. 193; *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *Murray v. Oliver*, 6 Ired. Eq. (N. C.) 55; *Collier v. Collier's Exrs.* 3 Ohio St. 369; *Cole v. Smith*, 4 Pa. St. 376; *Smith v. Puryears*, 3 Heisk. (Tenn.) 706; R. S. ch. 3, sec. 3, p. 59; *Gray v. Sherman*, 5 Allen (Mass.), 198.

²⁸⁰ *Corr v. Porter*, 33 Gratt. 278, 283; *Payne v. Payne*, 18 Cal. 291; *Stover v. Kendall*, 1 Coldw. 557; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Rose v. Drayton*, 4 Rich. 260; *Murray v. Oliver*, 6 Ired. Eq. (N. C.) 55.

²⁸¹ Mass. Pub. Stats. (1882), chap. 127, sec. 8.

manner required by the statute. But, in doing this, he may use the same form of words, without variations or with variations, and the same written or printed document that was used at first."²⁸²

The rule seems to be well settled that where one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents of such instrument subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon. In such case slight evidence will suffice.²⁸³

Generally it must be regarded purely as a question of intent, although a decision in Tennessee holds its so called prominence by contesting this view.²⁸⁴ The opposing view is very decidedly prominent as may be seen from the following cases:²⁸⁵

a. *By subsequent marriage and birth of child.* Reason is the soul of the law; and when the reason of any particular law ceases, so does the law itself. In England, it is now enacted that the marriage of either a man or woman shall revoke a pre-existing will, unless it is executed under a power of appointment. In New York they have a statute which declares in express terms that the marriage of a woman shall revoke a pre-existing will. In Massachusetts they have a statute which, as construed by the court, has the same effect. Similar statutes exist in several other States. Where such statutes exist, the question we are now considering cannot arise. In other States, where the testamentary laws and the rights and powers of married women are similar to those

²⁸² Barker v. Bell 46 Ala. 216, 222.

²⁸³ Broom's Legal Maxims, 576.

²⁸⁴ Smiley v. Gambill, 2 Head. 164.

²⁸⁵ Harrin v. Allen, 25 Mich. 525; Patterson v. Hickey, 32 Ga. 156; Durant v. Ashmore, 2 Rich. L. 184; Collogan v. Burns, 57 Me. 449; Marr v. Marr, 2 Head (Tenn.), 303; Clingam v. Mitcheltree, 31 Pa. St. 25; Smith v. Dolby, 4 Harr. (Del.), 350; Barker v. Bell, 46 Ala. 216;

Means v. Moore, 3 McCord (S. C.), 282; Mundy v. Mundy, 15 N. J. Eq. 290; Overall v. Overall, Litt. Sel. Cas. 513; Brown v. Thorndike, 15 Pick. (Mass.) 388; Johnson v. Brailford, 2 Nott & McC. (S. C.) 282; Wright v. Wright, 5 Ind. 389; Gains v. Gains, 2 A. K. Marsh. (Ky.) 190, Smith v. Clark, 34 Barb. (N. Y.) 140.

now existing in Maine, it has been held that the marriage of a *feme sole* will not revoke a pre-existing will. It is said in a New Hampshire case that when the incapacity of a married woman to make a will is removed, no reason remains why her will, made before her marriage, should be thereby revoked.²⁸⁶

It must be regarded as the settled rule in Iowa, that the birth of a legitimate child to the testator, subsequent to the making of a will and before the testator's death, will alone operate as an implied revocation of the will.²⁸⁷

§ 403. Lapsed devises. Should the devisee die before the testator, the devise lapses or falls into the *residuum* of the estate.²⁸⁸ But there is no lapse of the devise, if the devisee left issue capable of inheriting, who survive the testator. And where the estate devised is predicated upon a trust, the death of the trustee, during the life of the testator, will not effect the devolution of the property, as the court will supply a trustee capable of taking.

§ 404. Nuncupative wills. In general, real property cannot be devised by a nuncupative will.²⁸⁹ And in several States the amount which may be disposed of through the medium of a nuncupative will is regulated by statute.²⁹⁰

It is but common learning to add that nuncupative wills are in general accorded but scant respect, and should be subjected to the closest scrutiny. The statutes authorizing their existence should be strictly construed.²⁹¹

²⁸⁶ *Morey v. Sohier*, 63 N. H. 507; 2 N. E. R. 274. And see *Fellows v. Allen*, 60 N. H. 439; *Webb v. Jones*, 36 N. J. Eq. 163; *Ward's Estate* (Wis.), 35 N. W. Rep. 731; *Rice's Am. Probate Law*, 129.

²⁸⁷ *McCullom v. McKenzie*, 26 Iowa, 510; *Negus v. Negus*, 46 Id. 487; *Fallon v. Chichester*, Id. 588.

²⁸⁸ *Hamlin v. Osgood*, 1 Redf. (N. Y.) 409.

²⁸⁹ *Pierce v. Pierce*, 46 Ind. 86.

²⁹⁰ *Stimson's Am. Stat. Law*, sec.

2705.

²⁹¹ *Gibson v. Gibson* (Walk. Miss.), 364; *Bennett v. Jackson*, 2 Phillim. 190; *Morgan v. Stevens*, 78 Ill. 287; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192; *Yarnall's Will*, 2 Rawle (Pa.), 46; *Taylor's Appeal*, 47 Pa. St. 31; *Parsons v. Miller*, 2 Phillim. 104; *Biddle v. Biddle*, 36 Md. 630; *Lucas v. Goff*, 33 Miss. 629; *Mitchell v. Vickers*, 20 Tex. 377. See *Rice's Am. Probate Law*, 31, for exhaustive discussion.

§ 405. **Probate procedure.** The term probate, in legal contemplation, signifies the proof of a will before an officer or tribunal having jurisdiction to determine the question of its validity.²⁹² In popular apprehension, however, the term refers to the procedure incident to the administration and settlement of decedent estates. The tribunal referred to is indifferently denominated Probate Court, Surrogate's Court, or Orphan's Court, the jurisdiction of which, as to personal property, depends upon the domicile of the testator. But as to real estate it can only exercise jurisdiction over property that is situated within the territorial limits of that jurisdiction, whatever it may be. For exhaustive treatment of this entire subject, see Rice's Am. Probate Law; and for evidentiary facts, on the subject of probate matters, see 2 Rice, Ev. chap. 54.

²⁹² Reno v. McCully, 65 Iowa, 632.

CHAPTER XXIV.

JOINT ESTATES.

Art 1. Estates in common — tenancies in common.

SEC. 406. Definition and nature.

- a. Tenants in common may acquire their estate either by descent or purchase.
- 407. Incidents of tenancies in common.
- 408. One tenant cannot convey a distinct parcel of the land.
- 409. Dissent from the view last stated.
- 410. Tenants in possession cannot assail the common title.
 - a. Effects of purchase of an outstanding tax title by a co-tenant.
 - b. Co-tenant purchasing tax title regarded as a trustee for his associates.
 - c. Purchase of outstanding title by co-tenant inures to common benefit.
- 411. Possession of one tenant is the possession of all, unless.
 - a. Principles of disseizin examined.
 - b. What acts constitute a disseizin.
- 412. Contribution between co-tenants.
- 413. Rule as to betterments — statement of Mr. Anderson — doctrine of *Green v. Putnam*.
- 414. Accounting between co-tenants.
- 415. Partnership estates.
- 416. Incidents of the partnership relation.
 - a. Views of Mr. Justice Mitchell.
- 417. Partition and its incidents.
 - a. Objects of a partition suit.
 - b. Regarded as an absolute right.
 - c. Effect on dower.
 - d. Allowance for improvements and betterments.
 - e. Owelty defined.
 - f. Parol partition.

§ 406. **Definition and nature.** Tenancy in common imports the holding of an estate in lands by several persons, by several and distinct titles, but by unity of possession.¹ Or in

¹ 2 Bl. Com. 191; 4 Kent's Com. 367.

extended phrases such tenancy is where two or more hold the same land, with interests accruing under different titles; or accruing under the same title, but at different periods; or conferred by words of limitation importing that the grantees are to take in distinct shares.²

a. *Tenants in common may acquire their estate either by descent or purchase.* Tenants in common may acquire their estate either by descent or purchase—by deed or will, or by change of title from joint tenancy. It may arise by construction of law, but is severed only by one of two methods, viz., either by a merger of all the titles in one tenant, or by decree duly entered in an action of partition.³

§ 407. Incidents of tenancies in common. One of the incidents of a tenancy in common holding the title is, that each of the co-tenants is entitled to the exclusive possession of the entire property, as against the whole world, except his co-tenants. As between tenants in common and a trespasser, each tenant in common is better entitled to possession than a wrong-doer. The former is seized *per mi et per tout*, and has an interest in the whole, which entitles him to the enjoyment of the entire estate, as against every one except his co-tenants.

§ 408. One tenant cannot convey a distinct parcel of the land. It is a doctrine of long standing that one tenant in common cannot convey a distinct parcel of the common tract so as to bind his co-tenant.⁴

Cases might be multiplied upon this point, but these will suffice. Some hold the deed absolutely void, but the greater

² 1 Steph. Com. 323.

³ See generally on this subject, 2 Bl. Com. 192; 2 Prest. on Abstr. 75; 4 Kent's Com. 363; 1 Steph. Com. 323.

⁴ Smith v. Benson, 9 Vt. 141, 31 Am. Dec. 614; Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400; Great Falls Co. v. Worster, 15 N. H. 412, 449; Bartlett v. Harlow, 12 Mass. 348, 7 Am. Dec. 76; Peabody v. Minot, 24 Pick. (Mass.) 329; John-

son v. Stevens, 7 Cush. (Mass.) 431; Mitchell v. Hazen, 4 Conn. 495; Hartford & S. Ore. Co. v. Miller, 41 Conn. 112; Cogswell v. Reed, 12 Me. 198; Scott v. State, 1 Sneed, 629; Markoe v. Wakeman, 107 Ill. 263; Worthington v. Staunton, 16 W. Va. 208; Shepardson v. Rowland, 28 Wis. 108; Jewett v. Slocton, 3 Yerg. 492, 24 Am. Dec. 594; Griswold v. Johnson, 5 Conn. 363.

number treat it as valid between the parties, and that, if a partition should be made by which the parcel conveyed should be allotted to the grantor, it would enure to the benefit of the grantee by estoppel.

§ 409. **Dissent from the view last stated.** The Ohio courts have held that one tenant in common may lawfully convey a part of his undivided estate by specific bounds, and such a conveyance will be given effect so far as it is possible to do so without injury to the other co-tenants.⁶

And there is a well recognized tendency in late decisions to hold that such a conveyance may be relied upon to efface all legal and equitable rights formerly held by grantor.⁶

§ 410. **Tenants in possession cannot assail the common title.** The general theory of the law upon this subject is correctly represented by the following extract from an opinion delivered in the highest judicial tribunal of the State of Tennessee:

"Tenants in common by descent are placed in confidential relations to each other by operation of law, as to the joint property, and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third party. Being associated in interest as tenants in common, an implied obligation exists to sustain the common interest. This reciprocal obligation will be enforced in equity as a trust. These relations of trust and confidence bind all to put forth their best exertions, and to embrace every opportunity to protect and secure the common interest, and forbid the assumption of a hostile attitude by either."⁷

Notwithstanding all that has been said and written against the assertion of an adverse title by one of several co-tenants,

⁶ *White v. Sayre*, 2 Ohio, 110; *Prentiss' Case*, 7 Id. 473; *Dennison v. Foster*, 9 Id. 126; and see *Campau v. Godfrey*, 18 Mich. 32.

⁶ *Worthington v. Staunton*, 16 West Va. 208; *Markoe v. Wakeman*, 107 Ill. 263; *Crook v. Vandervoort*, 13 Neb. 505.

⁷ *Tisdale v. Tisdale*, 2 Sneed

(Ky.), 599, 64 Am. Dec. 775; see, also, *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Lee v. Fox*, 6 Dana (Mass.), 171; *Picot v. Page*, 26 Mo. 421; *Lafferty v. Turley*, 3 Sneed (Ky.) 182; *Saunders v. Woolman*, 7 Lea (Va.), 302; *Williams v. Gideon*, 7 Heisk (Tenn.), 620.

a critical examination of the authorities shows that they are not prohibited in all cases from establishing an adverse title. Wherever the interests of the different co-tenants accrue at different times, and owe their inception to entirely different instruments, and where no one tenant has exceptional advantages for securing the means of information regarding the status of the title, there is certainly no rule of law or morals that precludes the purchase of an outstanding title. Particularly is this true where there is no joint possession of the premises, and a corresponding absence of opportunity for knowing the claims of the other parties in the property. This view will be found to have the sanction of the following authorities: *Frentz v. Klotsch*, 28 Wis. 317; *King v. Rowan*, 10 Heisk, 682; *Brittin v. Handy*, 20 Ark. 381; *Matthews v. Bliss*, 22 Pick. 43; *Roberts v. Thorn*, 25 Tex. 736. The Illinois courts seem to hold the *contra* view, and their reasoning is entitled to great respect. But the desirability for a uniform rule in matters of this character is very apparent. And I am inclined to regard a rule which sanctions the free and untrammelled transfer of real property and interests therein as the one which should be upheld both in law and equity.*

a. *Effect of purchase of an outstanding tax title by a co-tenant.* There is considerable vascillation in the authorities as to the application of the principle "that one co-tenant cannot subvert the title of the other owners by the purchase of an outstanding tax title." Some decisions proceed upon the equitable principle that the fiduciary relation existing between the parties forbids a transaction that ignores the rights of one to the emolument and unconscionable advantage of the other—that a healthy manifestation of legal impartiality calls for an utter repudiation of such a claim. Others proceed upon the theory that "no man should receive a title created by his own wrong," or, in other words, a title founded upon his own default, or neglect of duty. If the co-tenant, who seeks to subvert the title of his fellows, has discharged his obvious duty in the premises there would have been no title to purchase, and there is no foundation for the suggestion, so frequently obtruded in this class of cases, that considera-

* See *Montague v. Selb*, 106 Ill. 149; *Bracken v. Cooper*, 80 Id. 229.

tions of public policy require promptitude and certainty in the payment of taxes, and as a menace to the sluggard, this liability of disseizin should be ever present. This argument may be plausible but it does not convince. We should "make the punishment fit the crime," and to deprive a man of a valuable estate for the picayune amount involved in a tax levy, simply as a reward to one who merely discharged his duty by paying what he himself owed, is utterly repugnant to all common sense and equity. In any event the authorities refuse to sanction such a proposition as unjust and inequitable.⁹ There is, however, this modification of what is otherwise an inexorable rule in most jurisdictions, viz: where the purchase of the outstanding tax title is from a stranger, after the period of redemption has expired, the tenant in common may hold the title for his own benefit,¹⁰ and in Massachusetts the rule has so far advanced as to allow an assignment of a senior mortgage to one of the co-tenants and permit him to thus defeat an action for partition.¹¹ The Supreme Court of Iowa has held that a purchaser of a tax certificate before the period of redemption has expired, by one who is a stranger to the title at the time, will enure to the benefit of the other tenants in common if he becomes such before the issuance of the tax deed by the proper officials.¹²

b. Co-tenant purchasing tax title regarded as a trustee for his associates. It is now laid down in authoritative decisions as a general principle that one who ought to pay the taxes on property cannot, by omitting to do so, purchase at a sale of the property for the non-payment of taxes, and thereby strengthen his title; that the deed to him will convey no title and that the payment of the money will be regarded as the

⁹ See *Lloyd v. Lynch*, 28 Pa. St. 419; *Frentz v. Klotch*, 28 Wis. 312; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Conn. Ins. Co. v. Bulte*, 45 Mich. 113; *Flinn v. McKinley*, 44 Ia. 68; *Voris v. Thomas*, 12 Ill. 442; *Downer v. Smith*, 38 Vt. 464; *Bernal v. Lynch*, 36 Cal. 135; *Piatt v. St. Clair*, 6 Ohio, 227; *Venable v. Beauchamps*, 3 Dana (Mass), 321.

¹⁰ *Watkins v. Eaton*, 30 Me. 529; *Reinboth v. Zebre Run Imp. Co.* 29 Pa. St. 139; *Keele v. Cunningham*, 2 Heisk (Tenn.), 288.

¹¹ *Blodget v. Hildreth*, 8 Allen (Mass.), 186.

¹² *Tice v. Derby*, 59 Iowa, 312; following *Flinn v. McKinley*, 44 Id. 68.

payment of the tax, and not as a purchase of the property." Other cases hold that such a purchaser invests himself with the attributes of a trustee for his co-tenants, but the purchase will enure to the benefit of the joint owners.¹⁴

c. *Purchase of outstanding title by co-tenant enures to common benefit.* In Sharswood & Budds Leading Cases, American Law of Real Property, vol. 3, p. 89, *et seq.*, there is a learned discussion under the following headnote: "Rule that purchase of outstanding title by one co-tenant enures to the common benefit." The author says: "An important result of the intimate relations existing between tenants in common is that one will not be permitted to purchase and set up against his co-tenant outstanding title, and from this it follows that, generally speaking, if one tenant in common take from a third person a conveyance of any title to an estate in the property held in common, such conveyance will enure to the benefit of all the tenants."¹⁵ The rule announced may be regarded as elementary, and is now entirely removed from discussion in that class of cases where the mutual interests originate under and by virtue of the same instrument, or act of the parties or of the law; or under agreement between themselves.

§ 411. **Possession of one tenant is the possession of all, unless.** a. *Principles of disseizin examined.* It is a generally well received rule of law that the possession of one tenant in common, though absolute and exclusive, if still consistent with the right of his co-tenant, is not to be construed as a disseizin, and that any act amounting as matter of law to an ouster is always necessary to constitute a disseizin of the co-

¹³ Middletown Savings Bank v. Bacharach, 46 Conn. 513; Johnson v. Smith, 70 Ala. 118.

¹⁴ Weare v. Van Meter, 42 Ia. 128; Page v. Webster, 8 Mich. 263; Allen v. Poole, 54 Miss. 323; Davis v. King, 87 Pa. 261; Christy v. Fisher, 58 Cal. 256.

¹⁵ The following are some of the authorities cited to support the proposition: Van Horne v. Fonda,

5 Johns. Ch. (N.Y.) 409; Knolls v. Barnhart, 71 N. Y. 474; Jones v. Stanton, 11 Mo. 433; Lloyd v. Lynch, 28 Pa. 419; Titsworth v. Stout, 49 Ill. 78; Brown v. Homan, 1 Neb. 448; Mandeville v. Solomon, 39 Cal. 125; House v. Fuller, 13 Vt. 165; Shell v. Walker, 54 Ia. 386; Dillenger v. Kelly, 84 Mo. 561; Moon v. Jennings, 119 Ind. 130.

tenant.¹⁶ This rule was first announced in Lord Hardwicke's time to an audience composed in various proportions of skeptical inquirers, obstinate opponents, and malignant scoffers, but its final position in the law of real estate has justified the most sanguine predictions of its original sponsors. It is an elementary rule that the entry of one tenant in common, upon the joint property, even if he appropriates the rents, cultivates the land, removes the standing timber, or asserts other positive acts of ownership, must not be construed as an adverse occupation, but rather as an assertion in support of the common title. Where, however, there is knowledge on the part of the co-tenant that such entry is claimed to be adverse, and if such entry is followed by a conveyance of the premises, that ignores the rights of the other tenant, possession under this conveyance, if continued for twenty years, will ripen into a full disseizin of the original co-tenant, and give to the disseizor an invulnerable title by adverse possession. We would be quite emphatic in asserting that there may be such acts and statements as will, when asserted by one co-tenant, amount in time to a practical disseizin, but, generally, acts of ownership, which, if proceeding from a stranger to the title, would result in the annihilation of the co-tenant's title, are entirely harmless if coming from any of the other part owners.

Acts having a contrary effect must be of such an unequivocal character as to preclude all idea of a joint ownership. Every act must tend to show the utter disregard of the relation, and such acts, taken in connection with the element of knowledge on the part of the party disseized or operated against, will constitute a strong presumption that there was an abandonment of an idea of holding the property. Hence it has been held that "an exclusive appropriation of a part of the land to his own use, by the erection of a permanent structure, would be evidence of an ouster of his co-tenant."¹⁷

b. *What acts constitute a disseizin.* From the peculiar and intimate connection existing between tenants in common of real estate, the proof of an ouster, by one of another of them,

¹⁶ *Bellis v. Bellis*, 122 Mass. 414.

¹⁷ *Bennet v. Clemence*, 6 Allen (Mass.), 10.

ought to be of the most satisfactory nature.¹⁸ The acts and declarations of the party in possession are to be construed much more strongly against him, than where there is no privity of title.¹⁹ There must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted against them.²⁰ There can be no legal doubt that one tenant in common may disseize another. The only difference between that and the other cases is, that the acts which, if done by a stranger, would *per se* be a disseizin, are, in the case of tenancies in common, susceptible of explanation consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseizin. It depends on the intent with which they are done.²¹

§ 412. **Contribution between co-tenants.** Equity has always entertained jurisdiction to compel contribution between joint tenants and tenants in common for reasonable charges and expenditures incurred for the common benefit.²² It frequently happens that one of two tenants in common discharges a mortgage indebtedness or other incumbrance which it is the primary duty of both to assume in equal proportions. In such a case the excess so paid by one represents an indebtedness due from the other, and the security held by the original creditor inures to the benefit of the one paying the amount due. Indeed it may be safely affirmed as a settled principle of equity jurisprudence, that one who assumes more than his just share of a common burden is subrogated to the rights of the creditor, and he is invested with this particular relation until the other co-owners have tendered their contribution, either voluntarily or through the compulsory process of the courts.²³

¹⁸ Adam v. Ames Iron Co. 24 Conn. 235.

¹⁹ Baily v. Trammell, 27 Tex. 328.

²⁰ Warfield v. Lindell, 38 Mo. 581.

²¹ Prescott v. Nevers, 4 Mason C. C. 330; Thornton v. York Bank, 45 Me. 161.

²² See Lingard v. Bromley, 1 V. & Beam. 114; Rogers v. MacKenzie, 4 Ves. 752; Gardner v. Diedricks, 41 Ill. 158.

²³ Lamb v. Montague, 112 Mass. 352.

Judge Story concludes his very brief notice of the subject of contribution between co-tenants by saying: "It seems unnecessary to dwell upon these cases and others of like nature, as they embrace nothing more than a plain application of principles already fully expounded. We may conclude this head with the remark that the remedial justice of courts of equity, in all cases of apportionment and contribution, is so complete and so flexible in its adaptation to all the particular circumstances and equities, that it has, in a great measure, superseded all efforts to obtain redress in any other tribunals."²⁴

§ 413. Rule as to betterments—Statement of Mr. Anderson—Doctrine of Green v. Putnam. Betterments acts are statutes which secure to a purchaser of land for valuable consideration, without notice of an infirmity in the title, an interest in the land equal to the value of the improvements or melioration he may have made.

The rule of the common law is that the owner of land shall not pay an intruder or occupant for unauthorized improvements. This induces diligence in the examination of titles, and prevents wrongful appropriations. Chancery, borrowing from the civil law, made the first innovation upon the doctrine; and in time held that when a *bona fide* possessor made meliorations in good faith, under an honest belief of ownership, and the real owner for any reason went into equity, the court, applying the maxim that he who seeks equity must do equity, and adopting the civil law rule of natural equity, compelled the owner to pay for such industrial accessions as were permanently beneficial to the estate.²⁵

The occupant must have peaceable possession, under color of title, and honestly believe that he is the owner of the land. Any instrument having a grantor and grantee, containing a description of the land, and apt words for their conveyance, gives color of title. Actual notice of an adverse title is proof of the absence of good faith.²⁶

²⁴ Story's Eq. Jur. sec. 505.

²⁵ Parsons v. Moses, 16 Iowa, 444-46 (1864), cases, Dillon, J.

²⁶ Beard v. Dansby, 48 Ark. 186-

87 (1886), cases. See generally Bright v. Boyd, 1 Story, 492-98 (1841); 2 Id. 607 (1843); Griswold v. Bragg, 18 Blatch. 206 (1880);

"Where one tenant in common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise, on their part, to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements, and their refusal."²⁷

The doctrine announced in *Green v. Putnam*, *supra*, and the cases following, has been considerably impaired by the remarkable decision of the New York Commission of Appeals, in *Scott v. Guernsey*, 48 N. Y. 123. Mr. Commissioner Leonard, who wrote for affirmance, with the unanimous assent of his colleagues (Hunt, Grey, Lott, and Earl), employs a line of argument in regard to this subject of improvements, or more properly, betterments, that has never been successfully controverted. It is true that Mr. Justice Finch, in the subsequent case of *Ford v. Knapp*, 102 N. Y. 135, distinguishes the *Scott v. Guernsey* case, but at the same time expressly sanctions the principle that it announced, and no discussion of this topic should be considered as even elementary, that leaves out of view a critical analysis of these last two cases.

Wheeler v. Merriman, 30 Minn. 376 (1883); *Effinger v. Hall*, 81 Va. 102-6 (1885), cases; *Green v. Bid-
dle*, 8 Wheat. 79 (1823); *Jackson v.
Loomis* (N. Y.), 15 Am. Dec. 347,
cases; 19 Blatch. 94; 48 Conn. 581;
11 Me. 482; 74 Id. 515; 13 Ohio,
308; 14 S. C. 338; 17 Vt. 109; 3
Pomeroy, Eq. sec. 1241, cases; 2
Story, Eq. sec. 799, 1237-38, cases;
1 Wash. R. P. 139, cases. (Cited
from Anderson's Law Dict.)

²⁷*Green v. Putnam*, 1 Barb. 507;
Martindale v. Alexander, 26 Ind.
105; *St. Felix v. Rankin*, 3 Edw.

Ch. (N. Y.) 323; *Swan v. Swan*, 8
Price, 518; *Doughaday v. Crowell*,
8 Stock. (N. J.) 204; *Dean v.
O'Meara*, 47 Ill. 120; *Kurtz v. Hib-
ner*, 55 Ill. 521; *Respass v. Brecken-
ridge*, 2 A. K. Marsh. (Ky.) 584;
Robinson v. McDonald, 11 Tex.
390, 62 Am. Dec. 480; *Hitchcock v.
Skinner*, Hoff. Ch. (N. Y.), 28;
Younge v. Heffner, 36 Ohio St.
232; *Sarback v. Newell*, 30 Kan.
102; *Broyles v. Waddell*, 11 Heisk,
(Tenn.) 32; *Bond v. Hill*, 37 Tex.
626; *Baird v. Jackson*, 98 Ill. 78;
Annely v. De Saussure, 17 S. C. 389.

§ 414. **Accounting between co-tenants.** A tenant in common may be compelled to account to his co-tenant for the use of the lands held in common, although he has received the benefits thereof without any attempt to exclude the other; or any promise or mutual understanding to give any compensation for the profits taken by him.²⁸

It is now well settled law, that where one tenant in common has received from others rents and profits of the common property, he is accountable in an action of assumpsit to his co-tenant for his share.²⁹

§ 415. **Partnership estates.** Where real property is purchased and owned by two or more partners, for partnership purposes, and such purchase was made out of partnership funds, the real property so held constitutes an estate in partnership. The legal title resides in the several partners as tenants in common. For the purpose of liquidating the partnership indebtedness, the real estate of a partnership will be regarded as personalty.³⁰ On the death or dissolution of the partnership the real estate belonging to the firm may be resorted to by any creditor in his efforts to secure payment, and the same may be sold. The surplus, if any, goes to the heirs.³¹

§ 416. **Incidents of the partnership relation.** Partners who take a deed in their individual right as tenants in common, stand in a different relation to the public from that in which they stand towards each other. Their acts tend to mislead both purchasers and creditors trusting to the apparent state of the title. Partners being the owners of the money which pays for the title, have the power of directing its application to suit their own purposes, and can, if they choose, always secure the identity of its character in the kind of title they take for it. If, therefore, they take title to themselves as

²⁸ Gage v. Gage, 66 N. H. 282.

²⁹ Buck v. Spofford, 40 Me. 328; Gowen v. Shaw, 40 Id. 58; Dyer v. Wilbur, 48 Id. 287; Barrell v. Barrell, 25 N. J. Eq. 173; Buckelew v. Snedeker, 27 Id. 82; Graham v. Pierce, 19 Gratt. (Va.) 28.

³⁰ Meily v. Wood, 71 Pa. St. 488; Shearer v. Shearer, 98 Mass. 107; Coder v. Huling, 27 Pa. St. 84.

³¹ Fairchild v. Fairchild, 64 N. Y. 471; Gray v. Palmer, 9 Cal. 639; Yeatman v. Woods, 6 Yerg. (Tenn.) 20; Shearer v. Shearer, *supra*.

tenants in common, instead of as partners, they, by their own election, stamp the character of the title taken as to those who afterwards deal with them.³²

It is a rule of universal recognition that real estate acquired with partnership funds, or on partnership credit and for partnership purposes, is regarded in a court of equity as partnership property, and is subject to the payment of partnership debts, in preference and priority to the separate debts of the several parties; and it is wholly immaterial, says Judge Story, in the view of a court of equity, in whose name or names the purchase is made and the conveyance taken, whether in the name of one or of all the parties, or in the name of a stranger, alone, or jointly with a partner. In all these cases, let the legal title be where it may, it is in equity deemed partnership property, not subject to survivorship, and the partners are deemed the *cestuis que trustent* therefor.³³

a. *Views of Mr. Justice Mitchell.* "When a partnership is dissolved and its affairs wound up and completely ended, and any land remains in specie, unconverted, this must be deemed a determination that it is no longer a part of the co-partnership stock, and an election to hold it thereafter, individually, as real estate. During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property, for otherwise the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage. They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as

³² Ebbert's Appeal, 70 Pa. St. 81; Abbott's Appeal, 50 Id. 238.

³³ 2 Story, Eq. Jur. sect. 1207; Hatchett v. Banton, 72 Ala. 435; Little v. Snedecor, 52 Id. 167;

Offutt v. Scott, 47 Id. 104; Coles v. Coles, 1 Am. Lead. Cas. Hare & W. notes, 492, note; and Dyer v. Clark. Id. 495, note.

personalty, or ceased to be partnership property. And what the partners may thus do voluntarily, the court may do for them, in an action brought to dissolve the partnership and wind up its affairs."³⁴

§ 417. **Partition and its incidents.** The division which is made between several persons, of lands, tenements, or hereditaments, or of goods and chattels which belong to them as co-heirs or co-proprietors. The term is more technically applied to the division of real estate made between co-partners, tenants in common, or joint tenants. The act of partition ascertains and fixes what each of the co-proprietors is entitled to have in severalty. It is either voluntary, or involuntary (by compulsion). Voluntary partition is made by the owners of the estate, and by a conveyance or release of that part to each other which is to be held by him in severalty. Compulsory partition is made by virtue of special laws providing that remedy. "It is presumed," says Chancellor Kent, 4 Com. 360, "that the English Statutes of 31 and 32 Henry VIII have been generally re-enacted and adopted in this country, and, probably, with increased facilities for partition."³⁵

a. *Objects of a partition suit.* "The object of the proceeding in a petition for partition is to turn an estate that is possessed in common into an estate in severalty, and not to furnish a mode of settling conflicting titles. It is a general rule that a petition for partition cannot be sustained on a mere right of entry. But there is a distinction between a mere possession of the plaintiff's share by a third person or by the defendant and a legal disseizin. In cases where privity has existed between the parties, as in case of joint tenants or tenants in common, and one tenant ousts his co-tenant by taking all the profits to himself, denying his co-tenant's right, such a possession may be treated as a disseizin, for the purpose of bringing ejectment; or, he may elect to treat such possession of his co-tenant as his possession, and, in that event, may maintain a petition for partition. But it would

³⁴ Woodward-Holmes Co. v. Nudd,

58 Minn. 236. Opinion by Mitchell, J.

³⁵ 2 Bouvier's Law Dic. 290.

seem from the authorities, if the party in such a case is effectually disseized, they no longer hold the estate together, and he is barred of his remedy for partition."³⁶

b. *Regarded as an absolute right.* The right of partition is an absolute right, which yields to no consideration of hardship or inconvenience." Anything that militates against this right is repugnant to the essential characteristics of co-tenancy.³⁸ And the tendency of our times is to greater freedom of sale and transfer of property, unfettered by conditions or limitations of the right of alienation.³⁹

c. *Effect on dower.* "In Missouri and Ohio the courts have been disposed to treat sales made in partition as conveying title, paramount to the wife's inchoate right of dower. The case of *Lee v. Lindell*, 22 Mo. 282, 64 Am. Dec. 262, holds that a partition sale during coverture of lands held by a woman's husband in common, divests her right of dower therein, although she was not made a party to the proceeding. The reasoning in this case quite generally commends itself."

"It is manifest that in proceedings in partition the interest of all parties would be promoted by a sale free from the incumbrance of dower. An uncertain and contingent interest of this character would undoubtedly affect the market price of the property to an extent greatly disproportioned to the actual value of that interest."⁴⁰

d. *Allowance for improvements and betterments.* An allowance of improvements to which a purchaser in good faith is entitled, may be made in partition proceedings instead of compelling the claimant to bring a separate action to recover his rights. This allowance will be made upon general principles of equity.⁴¹ And it is well settled that a court of equity once having acquired jurisdiction of a case has power to afford all proper equitable relief that the exigencies of the situation demand.⁴²

³⁶ Brock v. Eastman, 28 Vt. 660, 67 Am. Dec. 733.

³⁷ Freeman, Co-Ten. sec. 443.

³⁸ Mitchell v. Starbuck, 10 Mass. 11.

³⁹ Hartmann v. Hartmann, 59 Ill. 103; Royston v. Royston, 13 Geo. 425; Higginbottom v. Short, 25 Miss. 160, 57 Am. Dec. 198.

⁴⁰ 1 Scribner on Dower, 328.

⁴¹ Thorn v. Thorn, 14 Ia. 55; Ford v. Knapp, 102 N. Y. 135; Cooter v. Dearborn, 115 Ill. 509; but see Scott v. Guernsey, 48 N. Y. 1.

⁴² Green Bay Lumber Co. v. Ireland, 77 Ia. 636.

"The action for betterments, as they are now termed in the local statutes, is given on the supposition that it is intended to secure to the defendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been had no labor been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or of the land was always correctly estimated. The principles on which it is founded are taken from the civil law, where ample provision was made for reimbursing to the joint owner the expense of his improvements.

"The only objection which can be made is, that it is sometimes compelling the joint owner of an estate to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."

"The right of the occupant to recover the value of his improvements," says the court, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity, viz., that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money; is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements, without compensation to him who made them. This principle of natural justice has been very widely, we may say, universally, recognized."

e. *Owelly defined*. Owelly or equality of partition.—Owelly, according to Mr. Beach, 2 Eq. Jur. Sec. 993, is an allowance given to equalize the shares on partition of property.⁴⁵ It is

⁴³ Brown v. Storm, 4 Vt. 37.

(N. Y.) 302; Smith v. Smith, 10

⁴⁴ Whitney v. Richardson, 31 Vt. 306.

Paige, 470 (N. Y.); Field v. Leitner, 117 Ill. 341.

⁴⁵ Phelps v. Green, 3 Johns. Ch.

not a common law right, but is exclusively equitable in its origin and nature, and is awarded by a court of equity generally wherever partition is made, and it is impracticable to make a fair and equitable division of the lands; the co-tenant receiving the less valuable portion, being awarded a sum of money or an equivalent.⁴⁶

Owelty is, however, in many States the subject of legislative provisions,⁴⁷ and in some of the States is entirely superseded by other remedies.⁴⁸

f. Parol partition. Mr. Washburn, in his work on Real Property, declares, in general terms, that "no parol partition can be effectual unless accompanied by deeds from one co-tenant to the other, inasmuch as the Statute of Frauds applies to such cases."⁴⁹ Mr. Browne, in his Treatise on the Statute of Frauds, sec. 71, after showing some of the decisions on both sides of this question, announces, as his conclusion, that "the decided weight of authority in the United States seems to favor the English view of this question, and to be opposed to allowing a verbal partition to be effectual even to sever the possession of tenants in common."⁵⁰

"Although it is laid down that a parol partition is good as between the parties, yet it seems to me that the equitable title only passes, which by adverse possession may ripen into a legal estate. In my opinion, the plaintiff has a right to have this parol partition confirmed by a decree vesting in him whatever title the defendant had in the premises."⁵¹ But a parol partition, followed by long acquiescence and possession, will be upheld.⁵²

Practice methods by which a partition is effected more properly fall within the scope of some work on Code Procedure, and the reader is referred to the various treatises on

⁴⁶ *Smith v. Smith*, 10 Paige (N. Y.), 470; *Earl of Clarendon v. Hornby*, 1 P. Wms. 446.

⁴⁷ *Field v. Leitner*, 117 Ill. 341; *Smith v. Smith*, 10 Paige Ch. (N. Y.) 470.

⁴⁸ *Field v. Leitner*, 117 Ill. 341. Cited from *Beach on Modern Eq. Jur.* vol. II, p. 1067, sec. 993.

⁴⁹ 1 Washb. on Real Property, 430.

⁵⁰ *Den ex dem Woodhull v. Longstreet*, 3 Harr. (18 N. J. Law), 414.

⁵¹ *Hazen v. Barnett*, 50 Mo. 507.

⁵² *Brazer v. Schofield*, 2 Wash. 209; *Wright v. Jones*, 105 Ind. 17; *Hank v. McComas*, 98 Ind. 460; *LaBourgeois v. Blank*, 8 Mo. App.

this subject for further elucidation. In a work of this character every form of civil action incident to real property from Trespass and Ejectment to Partition and Foreclosure might be analyzed and expounded, but such an undertaking must be reserved for more ambitious authors than the present.

JOINT ESTATES,—(Continued.)

Art. II. Joint tenancy — Coparcenary — Community property.

SEC. 418. Definition and nature.

- 419. Distinction between joint and several estates.
- 420. Survivorship the distinguishing attribute of joint tenancy.
- 421. Joint tenancies not favored — flickering to extinction.
- 422. How severed — by the construction of its constituent unities.
- 423. Estates in coparcenary.
- 424. Community property and its incidents.
 - a. Nevada statutory provisions relating to.

§ 418. **Definition and nature.** Chancellor Kent defines joint tenancy with precision and brevity, viz: "Joint tenants are persons who own land by a joint title, created expressly by one and the same deed or will. They uniformly hold by 'purchase' (as distinguished from 'descent.') The estates need not be of the same duration, nature, or interest. The beneficial act of one enures to all tenants. By statute one tenant may maintain an action for waste or of account against his co-tenant. They join and are to be joined in suits. They are seized "*per my et per tout.*" Each has entire possession of every parcel and of the whole. Survivorship is the distinguishing incident; whence the early law, which was averse to the division of tenures, favored this species of tenancy. In this country the estate is reduced in extent, and the incident of survivorship is abolished, except as to titles held by trustees and conveyances to husband and wife, which conveyances are rather to one person than strict joint tenancies."⁵³

Two or more persons to whom are granted lands or tenements to hold in fee simple, fee tail, for life, for years, or at will, are joint tenants and the estate which they thus hold is called an estate in joint tenancy.⁵⁴

⁵³ 4 Kent, 357.

⁵⁴ 2 Bl. Com. 179.

§ 419. Distinction between "joint" and "several" estates. "Joint tenancy is when two or more persons, not being husband and wife at the date of its acquisition, have any subject of property jointly between them in equal shares by purchase."⁵⁸

All estates are divided as to their qualities in respect to the number of owners into estates in severalty and joint estates.⁵⁹

An estate in severalty is one that is held by a person in his own right only, without any other person being joined or connected with him, in point of interest, during his estate therein.⁶⁰

§ 420. Survivorship the distinguishing attribute of joint tenancy. As previously stated the distinguishing attribute of joint tenancy rests in the principle of survivorship, which places the absolute fee of the property in the last survivor without the least reference to the heirs of the former deceased co-tenants.⁶¹ Hence it is that two corporations can never be regarded as joint tenants, because the principle of survivorship cannot obtain, as, in contemplation of law, a corporation never dies.⁶² This principle of survivorship is so palpably unjust as to meet with very general condemnation. And the rule of survivorship has been quite generally abrogated by statute except, perhaps, in the case of joint trustees. It should be added that an estate in joint tenancy is never created by operation of law, and must exist, if at all, by the specific act of the parties. Such a tenancy is never taken by descent, but the title is invariably acquired by purchase or grant.⁶³

§ 421. Joint tenancies not favored — flickering to extinction. Estates in joint tenancy are flickering to extinction. They have never received a cordial recognition from our judiciary, and the odious attribute of survivorship which is the leading characteristic of the estate has contributed more than any other incident to its present decrepitude and odium.

⁵⁵ Cited from Freeman on Co-tenancy and Partition, p. 64. 289; *Overton v. Lacy*, 6 B. Mon. (Ky.) 13, 17 Am. Dec. 111.

⁵⁶ 2 Bl. Com. 180.

⁵⁹ *DeWitt v. San Francisco*, *supra*.

⁵⁷ 2 Bl. Com. 179.

⁶⁰ 2 Bl. Com. 180; see *McPherson*

⁵⁸ *DeWitt v. San Francisco*, 2 Cal.

v. Snowden, 19 Md. 230.

Several States, notably Georgia, Ohio, Tennessee and Oregon, have utterly oblivionized this species of tenancy. And other States have reached similar results through statutory enactments, which provide for the distribution of a decedent's property who had previously held as a joint tenant — "in the same manner as if he were a tenant in common." Still other jurisdictions have struck a blow at the survival of this estate by enactments that require a grantor or deviser to insert specific words importing his intent to create a joint tenancy — otherwise the statute directs that the interest transferred shall be regarded as a tenancy in common. The Connecticut courts, from the very inception of the State's autonomy, quietly ignored the existence of such estates, and manifested their aversion by repeated reference to the "odious principle of survivorship" with its implied resemblance to primogeniture and other medievalisms that the Puritan conscience could not abide.⁶¹

§ 422. How severed — by the destruction of its constituent unities. "A joint tenancy may be severed in three ways: 1, By an act of one of the tenants operating on his own share, and creating a severance as to that share; 2, By mutual agreement; and, 3, By such a course of dealing as intimates that the interests of all were mutually treated as constituting a tenancy in common."⁶² To this may be added, as a fourth means of severance, proceedings against the joint tenant producing an involuntary alienation of his title. In the case of income accruing to joint tenants it seems no act of severance is necessary.⁶³

By the destruction of any of its constituent unities, except that of time, joint tenancy is severed. But where all the joint owners have united in a devise to the survivor, that survivor will take the property in severalty. An early well considered case has held that a severance of the joint tenancy

⁶¹ *Sergeant v. Steinberger*, 2 Ohio, 305; *Nichols v. Denny*, 37 Miss. 59; *Berdan v. Van Riper*, 16 N. J. L. 7; *Rogers v. Crider*, 1 Dana (Ky.) 242; *Phelps v. Jepsom*, 1 Root (Conn.)

48; *Martin v. Smith*, 5 Binn. (Pa.) 16; *Miller v. Miller*, 16 Mass. 59.

⁶² *Williams v. Hensman*, 1 Johns. & H. 557.

⁶³ *Freeman on Co-tenancy and Partition*, p. 82.

may be effected by the due execution, on the part of two of three joint tenants of a mortgage which was subsequently foreclosed."

§ 423. **Estates in coparcenary.** *Coparcenary.* This title is one of the most formidable in the English text books, where we find a great mass of learning displayed in the exegesis of the subject, which seems to have agitated the legal minds of Bracton's day, and become a well settled principle of the law of real property under the Plantagenets. On this side of the Atlantic the subject is practically ignored, as with us heirs take as tenants in common and may institute a partition suit for the purpose of determining their respective rights.

It would be entirely profitless to pursue the learning on this subject as it is now encumbered by visionary speculations of doubtful value to the American practitioner. That the estate formerly existed sporadically in this country is not denied, but those who wish to view legal situations in their true perspective will no longer obscure their view by misty exhalations from the legal bog of English coparcenary. When the science of the law becomes adulterated with nescience it becomes poisonous and irritating.

§ 424. **Community property and its incidents.** In the States and territories carved out of the Louisiana purchase, and the cession from Mexico, a species of joint estate has been recognized that was unknown to either the common or civil law. The Code Napoleon created, defined and regulated the community of assets as between husband and wife. But just where these notions of community property crept into the remote provinces of Mexico is a matter of conjecture. Certain it is that the principle of community is there, and appa-

⁶⁴ *Simpson v. Ammons*, 1 Binn. (Pa.) 175.

Estates in this country generally descend to all the children equally, there is no substantial difference between coparceners and tenants in common. The title inherited by more persons than one, is, in some of the States, expressly declared to

be a tenancy in common, as in New York and New Jersey, and where it is not so declared the effect is the same; the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States. (4 Kent Com. 363; *Stevenson v. Cofferin*, 20 N. H. 150.

rently to stay. But I can only enjoin upon the practitioner in those jurisdictions the careful observance of the statutory law, as it is impracticable, in a work of this character, to extend the treatment of this subject.

a. *Nevada statutory provisions relating to.* Secs. 1 and 2 of the Act of the Legislature of Nevada defining the rights of husband and wife are as follows:

Sec. 1. "All property of the wife, owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."

Sec. 2. "All other property acquired after marriage, by either husband or wife, or both, except as provided in sections fourteen and fifteen of this act, is community property."⁶⁶ Sections fourteen and fifteen of the same act are as follows:

Sec. 14. "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

Sec. 15. "When the husband has allowed the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property."

The subject of *Waste* in its relation to joint tenants is fully considered in chapter 10, *ante*.

JOINT ESTATES — (Continued.)

Art. III. Homestead exemptions.

- SEC. 425. Nature of homestead estates — resemble joint tenancies.
- 426. Objects of the statutes relating to.
- 427. Characteristics of.
- 428. Rule in case of double house.
- 429. What necessary to create.

⁶⁶ Comp. Laws Nev. p. 56, secs. 151-2.

SEC. 430. What constitutes a family.

431. Will an estate in severalty support the right?

432. How construed.

433. Homestead rights, how alienated.

434. Effects of divorce.

§ 425. **Nature of homestead estates — resemble joint tenancies.** In considering the nature of the homestead estate, Chief Justice Sawyer, of California, said: "There is no occasion to discuss at large the question whether the homestead estate of the husband and wife is exactly the same in all respects, and with all the incidents of a joint tenancy, in the technical sense of the term, as used in the common law, or, whether the term 'joint tenancy' is the best that could be chosen to express the intention of the legislators. But we do not see why the character of the right, as defined, does not substantially approach very near a joint tenancy, although not created in precisely the same way, even if not a technical joint tenancy at common law. In the homestead estate, most of the unities of a joint tenancy are found, for it is created by the same instrument and at the same time. So far as the homestead right is concerned, 'they have one and the same interest, accruing by one and the same conveyance (or act), commencing at one and the same time, and held by one and the same undivided possession.' If the husband controls the property during coverture, it is not because he has a greater, more valuable, or different interest in the homestead from that of the wife, but because the law has made him the head of the household and devolved upon him the duty of management, not for his own interest merely but for the joint benefit of both. And since the amendment of 1862, the right of survivorship, the grand incident of joint tenancy is added. The main substantial difference now seems to be the want of power in one of the parties to sever the tenancy, or convey at all, without the concurrence of the other in the mode prescribed. But, however this may be, there is a joint interest in the homestead — a joint holding, if not a joint tenancy. The Legislature did not adopt the provision, that the husband and wife shall be deemed to hold the homestead as 'joint tenants,' without some object, and the term 'joint tenants' was used as best adapted to express that object.

They did not intend to use a meaningless phrase, to be attended by no consequences.”⁶⁶

§ 426. Object of the statutes relating to. Constitutional or statutory provisions exist for the exemption of a certain amount or value of realty, occupied by a person as his homestead, from a forced sale for the payment of his debts. In some States restraints are placed upon alienation by the owner, and in some the property descends to the widow and minor children free from liability for his debts. The estate is like an estate for life.”

It is settled: 1, That the object of the homestead law is to protect the family of the owner in the possession and enjoyment of the property; 2, That that construction must be given to such laws as will best advance and secure their object; 3, To divest a homestead estate, there must be a literal compliance with the mode of alienation prescribed by statutes.”

“It (meaning the homestead), is intended to be made, by this constitutional provision, the inviolable sanctuary of the family; not merely the head of the family, but of all its members, whether consisting of husband, wife, and children, or any other combination of human beings, living together in a common interest and having a common object in their pursuits and occupations. Such a combination of persons, so circumstanced, necessarily constitutes a family.”

The subject of homestead exemptions naturally affiliates with the cognate subjects of a widow's quarantine and maintenance; both are the offspring of the humane intendment that those stricken with sudden orphanage or widowhood, thus deprived of the protection and forethought it is their right to anticipate, shall receive on the nomination of the law certain favors and indulgences that will mitigate at least the rigors of a situation made desolate by death.

§ 427. Characteristics of. It is the exemption from sale that distinguishes the homestead from the other lands of its

⁶⁶ Barber v. Babel, 36 Cal. 16;

McQuade v. Whaley, 31 Id. 531.

⁶⁸ Howell v. McCrie, 36 Kan. 644

(1887), cases, Simpson, Commis-

⁶⁷ Anderson's Law Dict., title sioner.

“Homestead Laws.”

owner. It suspends and prevents the remedy of the creditor by execution or other final process as long as it continues."

The Homestead Law has been a fruitful source of litigation and is quite likely to confound the wisdom of the future if the case last cited with its five separate opinions may be relied upon as warranting one more from us. The homestead has been called a determinable fee, but no new estate has been conferred upon the owner, and no limitation upon his old estate imposed; it is obvious that it would be more correct to say that there has been conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him.⁶⁹ Their legal effect is simply to protect the occupant in the enjoyment of the land set apart as a homestead unmolested by his creditors.

The Kentucky statute exempts to the debtor as a homestead land worth not over \$1,000, if he be a *bona fide* house-keeper, with a family. The nature of this right is not fixed by the statute by name. He may sell the property, but is divested of the right to it if he permanently abandons it as his home. It may, perhaps, be said to be a qualified estate.

It continues after his death, for his widow, during her occupancy of it, though there be no children.⁷¹

The husband has the like right in the homestead of the deceased wife. The court has decided that where the right is thus derivative the having of a family is not necessary to its continuance. It is to the creation of the right at the outset in the husband or wife, but not to the continuance of it in the survivor.⁷²

The exemption of certain property from execution attaches to the proceeds of insurance thereon which the owner intends to invest in similar exempt property.⁷³

There is probably no civilized State or country in the world in which some kind of an exemption is not allowed. These statutes are designed as a protection for poor and destitute

⁶⁹ Rankin v. Shaw, 94 N. C. 405.

⁷⁰ Citizens' Nat. Bk. v. Green, 78 N. C. 247.

⁷¹ Gay v. Hanks, 81 Ky. 522.

⁷² Ellis v. Davis (Ky.) 11 Ky. L. Rep. 893.

⁷³ Puget Sound Dressed Beef & Packing Co. v. Jeffs, 11 Wash. 466.

families. They are based upon considerations of public policy and should be liberally construed.⁷⁴

Where a homestead dwelling was insured and burned, the Supreme Court of California held that the sum due from the insurance company was not subject to garnishment by a creditor of the husband.⁷⁵

Property purchased by a pensioner with his pension money is exempt.⁷⁶

A judgment for the wrongful conversion of property exempt from execution sale is itself exempt.⁷⁷

The debtor is no more responsible for a change in the character of the property through the destruction of his house by fire than he is for a change in its character the result of a wrongful seizure of his property by which it is transferred into a credit.⁷⁸

Where several lots form one enclosure and the entire property does not equal the value of the homestead exemption, it may be claimed in its entirety for the purposes of a homestead,⁷⁹ and it will not defeat the exemption if the premises are occupied in part for purposes of trade or barter, as where the front part of the dwelling is used as a store by the homesteader.⁸⁰ But if the property is used principally or chiefly for hotel or business purposes, it would be doing violence to the statute to place it under the immunities that surround the exemption laws.⁸¹

It is not so much an estate in land itself as a right of occu-

⁷⁴ 7 Am. & Eng. Encyclop. Law, pp. 130, 134; Cameron v. Fay, 55 Tex. 62; New Orleans Ins. Asso. v. Jameson, 6 Tex. Civ. App. 282; Tilotson v. Wolcott, 48 N. Y. 190.

⁷⁵ Houghton v. Lee, 50 Cal. 101; Ward v. Goggan, 4 Tex. Civ. App. 274; Reynolds v. Hanes, 13 L. R. A. 719, 83 Iowa, 342; Cooney v. Cooney, 65 Barb. (N. Y.) 524.

⁷⁶ Crow v. Brown, 11 L. R. A. 110, 81 Iowa, 344; Yates County Nat. Bank v. Carpenter, 7 L. R. A. 557, 119 N. Y. 550.

⁷⁷ Below v. Robbins, 8 L. R. A. 467, 76 Wis. 600.

⁷⁸ Bridgers v. Howell, 27 S. C. 425; Cone v. Lewis, 64 Tex. 331, 53 Am. Rep. 767; Rockwell v. Hubbell, 2 Dougl. (Mich.) 197, 45 Am. Dec. 252; Broome v. Davis, 87 Ga. 584; Butner v. Bowser, 104 Ind. 255.

⁷⁹ Geiges v. Greiner, 68 Mich. 153; ⁸⁰ Gregg v. Bostwick, 33 Cal. 228; Kirtland v. Davis, 43 Ga. 318; Smith v. Quiggans, 65 Ia. 637; Stanron v. Hitchcock, 64 Mich. 328.

⁸¹ Green v. Pierse, 60 Wis. 372; Reinback v. Walter, 27 Ill. 394; Laughlin v. Wright, 63 Cal. 113.

pancy which cannot be disturbed while the homestead character exists. This view of the homestead exemption was first taken by the late lamented Chancellor Judge Edwards H. Fitzhugh, in the case of *Richardson v. Butler*, reported in 1 Va. L. J. 120, and the same general view, although expressed in different language, is found in *Scott v. Cheatham*, 78 Va. 83.

A homestead may be claimed in a house and the village lot on which it is situated although the lot is in extent equal to two lots as the same are platted on the village map under a statute permitting a homestead exemption to be claimed in a quantity of land not exceeding in amount one lot if situated in a village, and the whole amount may be reserved from sale provided it does not exceed the value permitted by the statute. A verbal promise to give security cannot create a mortgage lien upon a homestead.⁸² "The debtor, by securing a homestead for himself and family, whether by an arrangement with creditors who might levy on it, or by the purchase of a house, or by moving into a house which he already owns, takes nothing from his creditors which the law has secured to them, or in which they have any vested right. He conceals no property. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself which the law recognizes and allows."⁸³

If property has been dedicated as a homestead, and is actually occupied by the owner for that purpose, the fact that the larger portion of the rooms was let to lodgers will not destroy the homestead right in the whole building.⁸⁴

The fact that certain rooms in a single building adapted to one family are rented for an annual paid rent to the owner will not exclude that part from being a portion of the homestead, the homestead right is not necessarily limited to that portion of the dwelling which is occupied by the family of the owner.⁸⁵

§ 428. Rule in case of double house. Under provisions exempting premises "owned and occupied" by a citizen of the

⁸² King v. Welborn, 83 Mich. 195.

⁸⁴ Goldman v. Clark, 1 Nev. 608.

⁸³ Hoar, J., in Tucker v. Drake,

⁸⁵ Mercier v. Chase, 93 Mass. 194.

11 Allen (Mass.) 146.

State, a double house erected, one-half for the use of the owner and the other half to rent, and actually put to such use, will not be exempt as to the rented part.⁸⁶ Where the homestead is defined as the dwelling house in which the claimant resides and the land on which the same is situated, a landowner who erects thereon a double house, with distinct entrances, and no connection between them on the inside, intending one for his residence and the other for tenants, and devoting them to that purpose, cannot claim the rented part as exempt.⁸⁷

§ 429. What necessary to create. Four things are necessary to a homestead exemption: 1, It must be confined to one lot and the dwelling house situated thereon with the appurtenances; 2, It must be owned and occupied as such homestead; 3, It must not exceed in value the sum allowed by statute; 4, It must be selected as a homestead. In determining whether a building claimed as a homestead is exempt as such, the question is whether the principal use of the building was that of a residence for the debtor and his family, especially whether in its architecture it was designed exclusively or properly as a residence.⁸⁸

In case the homestead right is claimed in property, the value of which is largely in excess of the statutory exemption, covering two lots and a building, built and used for building purposes, and owned by tenants in common who are in no way connected, and hold the property merely for business purposes, there can be no such exemption.⁸⁹

A partner cannot select and establish homestead rights in the real estate of the firm.⁹⁰ Where the parcel levied upon includes more than the statutory quantity, then a selection becomes necessary.⁹¹ This homestead right may be varied,

⁸⁶ Dyson v. Sheley, 11 Mich. 528.

⁸⁷ Tierman v. His Creditors, 62 Cal. 289.

⁸⁸ Thompson, Homestead and Exemptions, sec. 137; Dyson v. Sheley, 11 Mich. 528, 529; Rhodes v. McCormick, 4 Iowa, 374; Ackley v. Chamberlain, 16 Cal. 183; Gregg v. Bostwick, 33 Cal. 228; Mann v.

Rogers, 35 Cal. 319; Re Noah, 73 Cal. 590; Laughlin v. Wright, 63 Cal. 116.

⁸⁹ Tharp v. Allen, 46 Mich. 391-393; Amphlett v. Hibbard, 29 Mich. 298-300.

⁹⁰ Drake v. Moore, 66 Iowa, 58.

⁹¹ First Nat. Bank of Constantine v. Jacobs, 50 Mich. 340; Riggs v. Sterling, 60 Mich. 651.

however, before the owner has made his election and selection by failure to make the same before sale by the sheriff."

In order that the premises may be exempt, they must be set apart as a home by the owner and his family." The law can make no selection for the parties."

§ 430. **What constitutes a family.** The relation of husband and wife or that of parent and child is not necessary in order to constitute a family. A father and his adult son living together constitute a family.⁹² So with unmarried man supporting minor sisters.⁹³ It is said in 7 Am. & Eng. Cy. of Law, 804, note, that "the test of a legal duty (or support) has been rarely applied, and unquestionably a moral duty to support the members of a family is sufficient to constitute one its head."⁹⁴

A householder does not lose the right of homestead by the death of his wife and departure of his children who have arrived at maturity, or by divorce, as he may adopt other persons as members of his family.⁹⁵

Upon the question whether the homestead right has been or could be extinguished by the various acts of the parties holding that estate, Dewy, J., said in *Doyle v. Coburn, supra*: "Nor did the separation of husband and wife, as shown by her withdrawal in 1861, taking with her the child, defeat the homestead estate. The defendant has personally occupied the same as his place of residence up to the present time. He acquired his homestead as a 'householder having a family.' It is not necessarily lost by the death or absence of his wife and children. Others may be adopted as members of his household and his homestead retain its existence."

⁹² *Riggs v. Sterling, supra*; *Beecher v. Baldy*, 7 Mich. 505; *Lamore v. Frisbie*, 42 Id. 189; *Stevenson v. Jackson*, 40 Id. 702; *Matson v. Melchor*, 42 Id. 477.

⁹³ *Dyson v. Sheley*, 11 Mich. 527.

⁹⁴ *Stevenson v. Jackson*, 40 Mich. 703.

⁹⁵ *Rollings v. Evans*, 23 S. C. 237.

⁹⁶ *Greenwood v. Maddox*, 27 Ark. 658.

⁹⁷ Citing Thompson's Homesteads and Exemptions, sec. 45.

⁹⁸ *Silloway v. Brown*, 12 Allen (Mass.) 34; *Doyle v. Coburn*, 6 Id. 71; *Barney v. Leeds*, 51 N. H. 253; *Myers v. Ford*, 22 Wis. 139; *Whalen v. Cadman*, 11 Iowa, 226; *Parsons v. Livingston*, Id. 104; *Stewart v. Brand*, 23 Id. 477.

A widow who undertakes to keep together, care and support the minor children of her husband by a former wife is the head of a family and as such entitled to have a homestead set off for the benefit of herself and such children, although she was under no obligation to support them."

§ 431. **Will an estate in common support the homestead exemption right.** The humane and beneficent features of the homestead laws are admitted by all publicists and jurists as worthy of our advanced civilization. But it may well be questioned if it is expedient to allow lands held in common to be subject to this right of homestead exemption. The difficulty is in locating a particular plat upon which the building is situate, as a plat to which that particular tenant in common was entitled. Unless very simple minded the homesteader would naturally select the most available site on the entire joint estate. And what disposition can equity make, that will confirm him in his homestead exemption rights, and at the same time conserve the interests of the other co-tenants.

Upon the question whether an estate in common will support a right of homestead in one of the co-tenants, or whether it must be an estate in severalty, the authorities are conflicting, says Judge Thompson, in his learned Treatise on Homesteads and Exemptions, and he proceeds to give the reasons which support the opposing conclusions.¹⁰⁰

⁹⁹ Holloway v. Holloway, 86 Ga. 576; 11 L. R. A. 518.

¹⁰⁰ Thompson, Homesteads and Exemptions, secs. 180-189. In the affirmative he cites the following cases: Greenwood v. Maddox, 27 Ark. 660; Thorn v. Thorn, 14 Iowa, 49; Hewitt v. Rankin, 41 Id. 35; Tarrant v. Swain, 15 Kan. 146; Horn v. Tufts, 39 N. H. 478; Lacey v. Clements, 36 Tex. 663; Williams v. Wethered, 37 Id. 130; Smith v. Deschaumes, 37 Id. 429; McClary v. Bixby, 36 Vt. 254. In the negative the following cases

are cited: Wolf v. Fleischacker, Reynolds v. Pixley, Kellersberger, v. Kopp, Bishop v. Hubbard, Elias v. Verdugo, and Seaton v. Son, *supra*; Kingsley v. Kingsley, 39 Cal. 665; Cameto v. Dupuy, 47 Id. 79; Thurston v. Maddocks, 6 Allen, 427; Bemis v. Driscoll, 101 Mass. 421; Amphlett v. Hibbard, 29 Mich. 298; Ventress v. Collins, 28 La. Ann. 783; Simon v. Walker, 28 Id. 608; Borron v. Sollibellos, 28 Id. 355; West v. Ward, 26 Wis. 580.

§ 432. **How construed.** Statutes exempting real property from sale on execution have received a liberal construction by nearly all the courts of this country.¹⁰¹ They say that such statutes are remedial, and should receive such a construction as would give effect to the intention of the Legislature.¹⁰²

The courts of some of the States have not adopted this broad rule of liberal construction, but, in our opinion, reason, as well as the weight of authority, is with those that do.

In the case of *Crow v. Brown*, 81 Iowa, 344, 11 L. R. A. 110, it was held that property purchased with pension money was exempt by virtue of the provisions of the Federal statute which provided that such money should be wholly for the benefit of the pensioner. This decision was made after a careful consideration by that learned court, and the fact that there was a dissenting opinion by one of the judges cannot be said to detract from the authority of the case. On the contrary, the very fact that there was a division among the judges of the court would be likely to cause the case to be more carefully considered than it otherwise would have been. In the case of *Below v. Robbins*, 76 Wis. 600, 8 L. R. A. 467, it was held by the Supreme Court of Wisconsin that a judgment for the wrongful conversion of exempt personal property was itself exempt, and it is evident that the course of reasoning which led to such a decision would fully sustain the contention of the appellant above referred to.

§ 433. **Homestead rights, how aliened.** In some of the States, notably Kansas, a constitutional provision exists

¹⁰¹ See *Peverly v. Sayles*, 10 N. H. 356; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Connaughton v. Sands*, 32 Wis. 387; *Campbell v. Adair*, 45 Miss. 170; *Kuntz v. Kinney*, 33 Wis. 510; *Robinson v. Wiley*, 15 N. Y. 489; *Howe v. Adams*, 28 Vt. 541; *Moss v. Warnes*, 10 Cal. 296; *Bevan v. Hayden*, 13 Iowa, 122; *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173.

¹⁰² See *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Wassell v. Tunnah*, 25 Ark. 101; *Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397; *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; *Alvord v. Lent*, 23 Mich. 369; *State v. Romer*, 44 Mo. 99; *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71; *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210.

which requires the joint consent of husband and wife to any alienation of the homestead estate. Quite likely statutory regulations of a similar import are in vogue elsewhere. And in either case, any alienation of the homestead must be viewed with reference to these provisions. It is not for the courts to refine away the recitals of a statute, or ignore the fundamental law. Joint consent clearly implies the concurrent action and mental accord of husband and wife. And public policy clearly suggests the importance of preserving to each family an abiding place, secure against improvident alienation and incumbrance. Nothing will conduce more surely to a higher social environment than a home owned by the occupants—beyond the reach of cunning or greed or dissoluteness. The rule is inflexible in all jurisdictions where joint consent is a legal prerequisite to alienation, that the homestead cannot be conveyed or encumbered by husband or wife acting separately at different times, and in different places, and through the medium of different instruments. But in all cases, there must be the intelligent joint action of the parties, free from any covinous agreement or intention.¹⁰³

Their separate deeds are not sufficient to pass the title.¹⁰⁴

The homestead being held in the nature of a joint tenancy with the incident of survivorship attached, separate conveyances cannot avail to divest the title.¹⁰⁵

Most of the statutes declaratory of the subject provide in terms that no conveyance of the estate in which a homestead exists, or release or waiver thereof, shall operate to defeat the right of the owner or of his wife and children to have a homestead therein, unless such conveyance is by a deed in which the wife of the owner, if he has any, joins for the purpose of releasing such right in the manner in which she may release her dower.

§ 434. Effects of divorce. The Supreme Court of Iowa, quite recently said: "It is true his divorced wife was awarded

¹⁰³ Ott v. Sprague, 27 Kan. 620;
Howell v. McCrie, 56 Id. 656, 50
Am. Rep. 584.

¹⁰⁴ Dickinson v. McLane, 57 N. H.
31.

¹⁰⁵ Poole v. Girard, 6 Cal. 71;
Bunting v. Saltz, 64 Cal. 168.

the custody of his only child, and the court decreed that she could maintain it without charge to the defendant. But this decree does not exonerate him from liability to support the child, in the event of the inability of the mother to do so. It seems fully to accord with the provisions of the homestead law that the exemption should last as long as his liability to support exists, provided he continue in actual occupation of the property. Besides, the provisions of the homestead law are intended for the benefit of the children as well as of the parents. It does not accord with the spirit of the humane provisions of the statute, that the divorcing of the wife and awarding to her of the children, should deprive them of all interest in the homestead property.'"¹⁰⁶ In New Hampshire a divorced wife who was awarded the custody of the children was permitted to sell the homestead under her decree for alimony.¹⁰⁷

¹⁰⁶ Woods v. Davis, 34 Iowa, 265. See to same effect Doyle v. Coburn, 6 Allen, 73.

¹⁰⁷ Wiggin v. Buzzell, 50 N. H. 329.

"And it is true that courts liberally construe homestead laws, for the purpose of effectuating their wise and beneficent intentions, to the end that no family, through the misfortune of poverty or the death of its legal head, may be deprived of shelter, and where the homestead consists of a farm, of support. But all the reasons which have induced the law to favor the wife or widow in the matter of homestead rights are entirely absent in cases of divorce. There is no action known to the law wherein the entire property of both parties is brought more directly within the grasp and control of the chancellor than the action for divorce. In this action the chancellor reviews not only the marital rights and wrongs of the respective parties,

but their financial status and financial needs. He requires absolute information as to the number, age, and condition of all minor children. He knows it is the duty of the husband and father to support the family and educate the children. He knows that, in case of the death of the husband and father, the law places its hand upon so much of his property as constituted his homestead, and devotes it exclusively to the accomplishment of these purposes which it was the duty of the husband and father to accomplish while living. Where a divorce *a vinculo* is granted to an innocent wife, and she is given the custody of minor children, it is the duty of the chancellor, so far as the circumstances will permit,—and his power in that respect is plenary,—to compensate the innocent family for every right it has lost by reason of the legal separation from an offending husband and father." (Rosholt v. Mehus, 3 N. Dak. 513.)

JOINT ESTATES — (*Continued.*)*Art. IV. Estates by entireties.*

SEC. 435. How created.

- 436. Incidents of this estate.
- 437. How affected by married women's Acts.
- 438. The separate estate of a married woman.
- 439. Husband may convey his interest to his wife.
- 440. The separate estate of a married woman — *Yale v. Dederer* examined.
- 441. Power of husband over.
 - a. Lease by husband.
- 442. Husband and wife may take as joint tenants or tenants in comon.
- 443. Attitude of the courts as to estates by entirety.
- 444. Dissolution of the tenancy by death or divorce.
- 445. Rule as to moieties.

§ 435. **How created.** A tenancy by entireties arises whenever an estate vests in two persons, they being, when it so vests, husband and wife. It may exist in personal as well as real property; in a chose in action as well as in a chose in possession.¹⁰⁸ The common law rule is that the words which, in a conveyance to unmarried persons, constitute a joint tenancy, will create, if the grantees are husband and wife, a tenancy by entireties.

If an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common, for, being one person in law, they cannot take the estate by moieties, but both are seized of the entirety — the consequence of which is, that neither can dispose of any part without the assent of the other, but the whole must remain to the survivor.¹⁰⁹ This assertion is supported by a vast array of authority.

Under well recognized rules of the common law parties occupying the relation of husband and wife were considered one person, and when land was conveyed to them as such, they held, not as joint tenants, but each being seized of the whole *per tout et non per my*, so that the survivor takes the

¹⁰⁸ *Freem. Co-ten. secs. 63, 68; Gil-lan v. Dixon, 65 Pa. 395.*

¹⁰⁹ 2 *Bl. Com. 182; Anderson, Law Dict. tit. "Entirety."*

whole, not by survivorship, but by virtue of the original estate.¹¹⁰

A dictum in *Meeker v. Wright*, 76 N. Y. 262, supported by a divided court, unsettled the law for some time in the State of New York as it was supposed to indicate an opinion of the Court of Appeals that, in such cases, husband and wife took as tenants in common; but the question was finally set at rest by the decision in *Bertles v. Nunan*, 92 N. Y. 152, which held the law to be as stated in the context. This case overruled that of *Feeley v. Buckley*, 28 Hun (N. Y.), 451.¹¹¹

§ 436. Incidents of this estate. *Husband and wife take as one person.* Tenancy by entireties is substantially a joint tenancy, modified by the common law doctrine that husband and wife are one person. The various enactments during the last forty years, tending to enlarge the rights of married women, should be construed as not affecting this peculiar tenancy, which remains precisely as it existed at common law. For decisions upholding this assertion see *Marburg v. Cole*, 49 Md. 402; *McCurdy v. Canning*, 64 Pa. St. 39; *McDuff*

¹¹⁰ *Jackson v. Stevens*, 16 Johns. (N.Y.) 110, 115; *Rogers v. Benson*, 5 Johns. Ch. (N.Y.) 431, 437, 1 L. ed. 1132, 1139; *Barber v. Harris*, 15 Wend. (N. Y.) 615-617; *Jackson v. McConnell*, 19 Id. 175, 177; *Dias v. Glover*, 1 Hoff. Ch. (N. Y.) 76, 77, 6 L. ed. 1069, 1070; *Doe v. Howland*, 8 Cow. (N. Y.) 283; *Torrey v. Torrey*, 14 N. Y. 430; *Den v. Hardenburgh*, 10 N. J. L. 49; *Shaw v. Hearset*, 3 Mass. 521; *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Ames v. Norman*, 4 Sneed (Ky.), 683; *Rogers v. Grider*, 1 Dana (Mass.), 242; *Cochran v. Kerney*, 9 Bush. (Ky.) 199; *Gibson v. Zimmerman*, 12 Mo. 385; *Stuckey v. Keefe*, 26 Pa. 397-399; *Taul v. Campbell*, 7 Yerg. 319; 4 Kent, Com. 362; 2 Bl. Com. 182; *Fairchild v. Chastelleaux*, 1 Pa. 176; *Johnson v. Hart*, 6 Watts & S. 319; *Ketchum v. Walsworth*, 5 Wis. 102; *Brownson v. Hull*, 16 Vt. 309;

Fisher v. Provin, 25 Mich. 347-351; *Davis v. Clark*, 26 Ind. 428; *McDuff v. Beauchamp*, 50 Miss. 531; *Greenlaw v. Greenlaw*, 13 Me. 182-186; 1 Washb. Real Prop. 278; *Bertles v. Numan*, 92 N. Y. 152.

¹¹¹ *Gerard*, Real Estates Titles, 3d ed. 67. See note to *Baker v. Stewart* (Kan.), 2 L. R. A. 434.

In the oft quoted case of *Meeker v. Wright*, 76 N. Y. 262, it was decided that "Where, since the passage of the Act of 1860 concerning the rights and liabilities of husband and wife, lands have been conveyed to the husband and wife jointly, without any statement in the deed as to the manner in which the grantee shall hold, they are tenants in common." Subsequently, in *Bertles v. Nunan*, 92 N. Y. 152, that decision was overruled by a divided court.

v. Beauchamps, 50 Miss. 531; *Fisher v. Previn*, 25 Mich. 347; *Hulet v. Inlaw*, 57 Ind. 412.

By the common law the right to control the possession of an estate by entireties during the joint lives of the husband and wife is in the former precisely as when the wife is sole seized.

"Neither can convey during their joint lives so as to bind the other, or defeat the right of the survivor to the whole estate,"¹¹² subject to this limitation. The husband has all the rights that usually pertain to his own estate — all the incidents that under the common law attach to the husband by the act of marriage, which includes the absolute control of the wife's estate. He has, during coverture, the usufruct of all the realty which the wife has, either in fee, fee tail, or for life. He has the further right to make a lease of an estate conveyed in fee to himself and wife, which will bind the wife's interest during coverture, and can only be defeated by his death before the wife.¹¹³ There is some vacillation in the authorities as to the effect of these various remedial statutes affecting the status of this estate, and while many hold to the views above outlined, others manifest a tendency to more liberal construction and virtually abolish the chief incident of this old and time-honored title.¹¹⁴

The doctrine was very exhaustively considered in *Chandler v. Cheney*, 37 Ind. 391, in which the court say: "As between husband and wife there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as to the husband. Then, how can the husband possess any interest separate from the wife, or how can he alienate or encumber the estate, when all the authorities agree that the wife can neither convey nor encumber such estate? We are of the opinion that from the peculiar nature of this estate, and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control,

¹¹² *Pierce v. Chase*, 108 Mass. 254.

¹¹³ *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Topping v. Sadler*, 5 Jones (N. C.), 357; *Washburn v. Burns*, 5 Vroom. (N. J.) 18; *Ames v. Norman*, 4 Sneed (Ky.), 683; *Fair-*

child v. Castelleaux, 1 Barr. 176; *Polluck v. Kelly*, 6 Ir. C. L. 367; *Bertles v. Numan*, 92 N. Y. 152.

¹¹⁴ See *Cooper v. Cooper*, 76 Ill. 57; *Clark v. Clark*, 56 N. H. 105; *Hoffman v. Steigers*, 28 Ia. 302.

and unity in conveying or encumbering it; and it necessarily and logically results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife. The estate is placed beyond the exclusive control of either of the parties, or the reach of creditors, unless it can be successfully attacked and set aside for fraud. Any other rule would create injustice and hardship. If the husband can dispose of the estate during their joint lives, the wife is deprived of the enjoyment without her consent. * * *

The property belongs as much to the wife as to the husband, and she has just as clear, undoubted, and equitable a right to the use and enjoyment of the property during the existence of the marriage, as she has to succeed to the estate upon the death of her husband. The opposite doctrine is full of absurdities and gross injustice. If the doctrine contended for by the appellant is correct, the husband may, without the consent and concurrence of his wife, lease the property to a stranger, and compel his wife and children to leave the comfortable home that belongs as much to her as to him, and compel them to live in some miserable hovel, while the husband spends his time in riotous living upon the rent derived from the joint estate. In such a case, the wife can have no relief except in the death of her husband. If the husband has a life estate separate and distinct from his wife, then he may mortgage such estate, or it may be seized and sold upon execution for his debts. In either event, the purchaser would acquire just the same interest that the husband had. The purchaser would be entitled to the possession during the life of the husband, to the exclusion of the wife. The right of the wife to the joint enjoyment of the estate, during the marriage, is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of the husband. The rights of the wife in the joint property are as sacred as those of the husband, and should be as firmly secured, guarded, and protected by law as are his. There is an equity in equality, but there is gross iniquity and injustice in permitting the husband to deprive the wife of the use and enjoyment of an estate that does not belong exclusively to either, but to both, and which belongs as much to the wife as to the husband." The doctrine laid down in *Chandler*

v. *Cheney*, 37 Ind. 391, has been repeatedly followed in Indiana.¹¹⁵

It has recently been said that "an examination of the cases which hold that the husband has exclusive control over an estate held by entireties will show that wherever a reason has been given for the rule, it is, that the common law gave the husband such control over the wife's separate real estate, therefore, he had the same rights over the undefinable interest she had in an estate held by entireties. Hence, we find that in most of the States where the statutes have clothed the wife with the power to manage, control, and use her separate real estate, the courts, following the logic of the situation, have extended this right to estates by entireties to the extent of denying the right of the husband or his creditors to deprive her of the use and enjoyment of her interest in such an estate during the life of her husband." It is so held in *Shinn v. Shinn*, 42 Kan. 1; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52; *McCurdy v. Canning*, 64 Pa. St. 39, 41.

The gift of a fee simple, or a gift of a capital sum of money to the "separate use" of a married woman gives her the same power of alienation over it, as if she were a single woman. The separate use is a creature of equity, and equity says the estate may be so limited to the married woman, as that she can get rid of every possible interest of the husband.¹¹⁶

§ 437. **How affected by the Married Women's Acts.** It has been contended, and in some jurisdictions held, that the legislation which secures to the wife the enjoyment of her separate estate is destructive of the legal unity of husband and wife, on which tenancies by entireties depend, but the later view is that such tenancies are not destroyed or impaired by it.¹¹⁷

In *Diver v. Diver*, 56 Pa. 106, it was expressly decided that the Pennsylvania act of April 11, 1848, did not in any man-

¹¹⁵ See *Dodge v. Kinsey*, 101 Ind. 102; *Barren Creek Ditching Co. v. Beck*, 99 Id. 247; *Carver v. Smith*, 90. Id 222; s. c. 46 Am. Rep. 210; *Patton v. Rankin*, 68 Ind. 245; s. c. 34 Am. Rep. 254; *Simpson v.*

Pearson, 31 Ind. 1; s. c. 99 Am. Dec. 577; *Davis v. Clark*, 26 Ind. 424; s. c. 89 Am. Dec. 471.

¹¹⁶ *Chapman v. Price*, 83 Va. 392.

¹¹⁷ 8 Am. & Eng. Ency. Law, p. 551, and cases cited.

ner affect the creation and enjoyment of estates by entireties; and Strong, J., in delivering the opinion of the court, said: "To hold it as operating upon the deed conveying land to a wife, making such deed assure a different estate from what it would have assured without the act, is to lose sight of the legislative purpose. Were we to do so it would become in many cases a means of divesting her of her property, instead of an instrument of protection."¹¹⁸

If we are to follow precedents in preference to principle, the "lawless science of the law" will disclose many of its ulcers. The old barbarian's theory that husband and wife are one person, in contemplation of law, is, in view of our social and institutional environment, without either substance or reason, and it is both useless and illogical to perpetuate such nonsense. The reason for its existence in the common law scheme of landed property was bottomed on the brutal theory that the wife's existence was properly one of poverty and dependence. While the law confirmed wealth, power, and domination upon the husband who became the absolute owner of everything belonging to the wife. This theory has had its day. And why we should continue this particular estate as one belonging to the modern law of real property is a mystery ever pressing for determination.

The common law doctrine of tenancies by the entireties was wholly out of line with the statutes, judicial decisions and the conditions and wants of the people of this country."¹¹⁹

In 1 Swift, Syst., 272, Judge Swift remarks that the odious and unjust doctrine of survivorship was never adopted in his State.

In *Cooper v. Cooper*, 76 Ill. 57, it was said that "under the legislation of this State, giving married women the right to acquire property, and hold the same free from their husband's control, the reason for the rule which holds that a conveyance to husband and wife makes them tenants by the entirety, with right of survivorship, has ceased to exist and they will, in this State, take and hold as tenants in common."

¹¹⁸ Re Bramberry's Estate, L. R. A. 22.

¹¹⁹ Shinn v. Shinn, 42 Kan. 1.

In *Hoffman v. Stigers*, 28 Iowa, 302, it was held that "under our law joint tenancies, and in entirety, are not favored, and a conveyance to two or more persons in their own right creates a tenancy in common, unless a contrary intent is expressed. And this rule, under our statute, applies to a conveyance, whether by judgment or deed, vesting the estate in the husband and wife jointly." In the opinion in that case it was also said: "And as the courts in most of the States condemn entailments or perpetuities, so we do and should joint tenancies, or at least their common law incident — the right of survivorship."

In New Jersey, when the title to real estate is conveyed to a married woman and paid for out of her separate estate, she is the *bona fide* owner of it, as if she were single. A husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors.¹²⁰

This State has been most liberal in modifying the rules of the common law prescribing the marital rights of the husband in the property of his wife and in protecting her against the claims of his creditors. In 1851 a widow was given the right to demand from the personal representative of her deceased husband all personal property which, at or immediately before her coverture, belonged to her, or which came to her during coverture by bequest, gift or inheritance, if it remained in his possession at the time of his death.¹²¹ In 1852 it was enacted that a married woman might receive by

¹²⁰ The following cases are upon the question of the construction of the Married Women's acts of New Jersey: *Horner v. Webster*, 33 N. J. L. 397; *Huyler v. Atwood*, 26 N. J. Eq. 506; *Lewis v. Perkins*, 36 N. J. L. 133; *Green v. Pallas*, 1 Beas. (12 N. J. Eq.) 267; *Quidort v. Pergeaux*, 18 N. J. Eq. 478; *Wells Separate Prop. of Mar. Wom.*, sec. 144; *Wilson v. Brown*, 2 Beas. (13 N. J. Eq.) 277; *Peterson v. Mulford*, 36 N. J. L. 485; *Court of Errors*, citing many decisions; *Beal v. Storm*,

26 N. J. Eq. 373; *Symmes v. Strong*, 28 Id. 132; *Stall v. Fulton*, 30 N. J. L. 430; *Black v. Black*, 30 N. J. Eq. 219; *S. P. in Penn.*, *Wells*, sec. 178; *Vreeland v. Vreeland*, 16 N. J. Eq. 523; *Atwater v. Underhill*, 22 Id. 604, citing with approval the N. Y. case of *Knapp v. Smith*, 27 N. Y. 277; *Owen v. Cowley*, 36 Id. 600; *Naylor v. Field*, 5 Dutch. 29 N. J. L. 287; *Bk. v. Sprague*, 20 N. J. Eq. 24.

¹²¹ *Laws of 1851*, p. 201.

gift, grant, devise or bequest, and hold for her sole and separate use, real and personal property, and the rents, issues and profits thereof, and that her sole and separate property should not be subject to the disposal of her husband or liable for the payment of his debts.¹²² In 1857 married women were authorized to bind themselves by covenants in conveyances of their lands, provided their husbands joined with them in the deeds,¹²³ and in 1862 it was enacted that if a married woman transacted business or purchased property, and thereby contracted debts, she might be sued at law for the recovery of the amount, and that any judgment thus obtained should bind her property.¹²⁴

In Illinois, by Act 1861, p. 143, real property belonging to a married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person, other than her husband, by descent, devise, or otherwise, together with all the rents, issues, income, and profits thereof, is declared to remain her sole and separate property, under her sole control, as though she were sole; and not subject to the disposal, control, or interference of her husband, or liable for his debts. She may dispose of her separate estate by her last will, in the same manner as a *feme sole*.¹²⁵

In New York, since the Married Woman's Act of 1848, a *feme covert* may create an express charge on her separate estate in the same manner as if she were single.¹²⁶

§ 439. Husband may convey his interest to his wife. A conveyance of land to a husband and wife created the peculiar title sometimes called an "estate by entireties" or "in entirety." Neither could sever this title so as to defeat or prejudice the title of the survivor.¹²⁷ We find nothing, however, to show that it has ever been considered that a husband could

¹²² Laws of 1852, p. 407.

¹²³ Laws of 1857, p. 485.

¹²⁴ Laws of 1862, pp. 271, 272.

¹²⁵ Rev. Stat, 1855, ch. 110; Cole v. Van Reper, 44 Ill. 64; McNeer v.

McNeer, 142 Id. 388; Jackson v. Jackson, 144 Id. 274.

¹²⁶ Yale v. Dederer, 18 N. Y. 265.

¹²⁷ Pray v. Stebbins, 141 Mass. 219, 1 New Eng. Rep. 521, 55 Am. Rep. 462, and cases cited.

not convey his title through a third person to his wife. On the other hand, the peculiar feature of this kind of estate is, that each is secure against an impairment of rights through the sole act of the other.¹²⁸

There is nothing in this to prevent the wife's acquiring the title of her husband; and in *Meeker v. Wright*, 76 N. Y. 262, 272, it was held that this might be done. This part of the decision in *Meeker v. Wright* was not questioned in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, or in *Zornlein v. Bram*, 100 N. Y. 12, and we have found nothing in any of the books denying the doctrine.

§ 440. **The separate estate of a married woman — Yale v. Dederer examined.** The separate estate of a married woman as we have stated, is, in the absence of legislation on the subject, created by conveyance, devise or contract. Its creation gives to her the beneficial use of the property which otherwise would not be brought under her control. As to such property she is regarded in equity as a *feme sole*, and it was, therefore, formerly held that her general engagements, though not personally binding upon her, could be enforced against the property. This doctrine, however, has been modified in modern times. It is now held that to charge her separate estate with her engagement, it must have been made with an intention on her part to create a charge upon such estate; that is, with reference to the property, either for its improvement or for her benefit upon its credit. There has been much diversity of opinion and some conflict both in the courts of England and of this country as to what is necessary to establish such intention on the part of the wife to charge her separate estate for her contract. It is conceded that there must have been an intention on her part to effect such a charge, otherwise her engagement will not have that effect.

The Court of Appeals of New York in the case of *Yale v. Dederer*, 22 N. Y. 450, considered very fully the evidence which would be required to charge the separate estate of the

¹²⁸ 2 Bl. Com. 182; Cruise, Dig. 132; 4 Id. 362; 1 Washb. Real. title 18, chap. 1, secs. 44-49; Preston, Estates, 131; 2 Kent's Com.

wife upon her contract, and in its examination reviewed the various decisions of the English Court of Chancery, pointing out their many differences and conflicts, and placed its decision upon this ground, that such estate could not be charged by contract unless the intention to charge it was stated in the contract itself or the consideration was one going to the direct benefit of the estate. In that case a married woman signed a promissory note as a surety for her husband, and it was held, though it was her intention to charge such estate, that such intention did not take effect, as it was not expressed in the contract itself.

In the case of *Willard v. Eastham*, 15 Gray (Mass.) 328, the same question was elaborately considered by the Supreme Judicial Court of Massachusetts. In that case a debt was contracted by a married woman for the accommodation of another person without consideration received by her, and it was held that the contract could not be enforced in equity against her separate estate unless made a charge upon it by an express instrument. And the court concludes, after a full consideration of the subject, by observing that the whole doctrine of the liability of a married woman's separate estate to discharge her general engagements rests upon grounds which are artificial and which depend upon implications too subtle and refined; and that "the true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well reasoned opinions of the Court of Appeals of New York in the case of *Yale v. Dederer*, which we have cited, and says: "Our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit or when the consideration goes to the benefit of such estate or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

§ 441. **Power of the husband over.** Mr. Chief Justice Beasley, in *Washburn v. Burns*, 34 N. J. L. 18, announces the doctrine to be "when an estate in land is vested in husband and wife as an entirety under the common law, the husband is entitled to the use and possession of the property during the joint lives of himself and wife. During the period the wife has no interest in or control over the property."¹²⁰

The right of the husband to control the estate held by entireties is not affected by statutes enabling married women to hold and dispose of their property as if sole unless expressly so stated.¹³⁰

a. *Lease by husband.* By the great weight of authority the husband may lease an estate conveyed to him and his wife in fee, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him.¹³¹

Husband's control of wife's separate property. The constant agitation of "women's rights," together with the steady expansion of equitable views regarding her property relations, has led to the all but complete subversion of the antiquated common law rules, which gave to the husband the absolute control of all her worldly possessions. These common law rules on this subject are not only odious but nauseous—what wonder that the late lamented Chief Justice Stephen indignantly characterized the entire rickety fabric as "chaos tempered by Fisher's Digest." Our equity courts have steadily indulged some very advanced views as

¹²⁰ See, also, *Pray v. Stebbins*, 141 Mass. 219; *Topping v. Saddler*, 5 Jones N. C. 357; *Jones v. Strong*, 6 Ired. L. 367.

¹³⁰ *Ibid.*, citing *Robinson v. Eagle*, 29 Ark. 202; *Hulett v. Inlow*, 57 Ind. 412; *Rogers v. Grider*, 1 Dana, 242; *Marburg v. Cole*, 49 Md. 402; *Fisher v. Provin*, 25 Mich. 347; *McDuff v. Beauchamp*, 50 Miss. 531; *Den v. Hardenbergh*, 10 N. J. L. 49; *Berties v. Numan*, 92 N. Y. 152; *Barber v. Harris*, 15 Wend. 615; *Bennett v. Child*, 19 Wis. 362; see, *contra*, *Cooper v. Cooper*, 76

Ill. 57; *Hoffman v. Stigers*, 28 Ia. 302; *Clark v. Clark*, 56 N. H. 105.

¹³¹ *Washburn v. Burns*, 34 N. J. L. 18; *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Jackson v. McConnell*, 19 Wend. (N. Y.) 175; *Berties v. Numan*, 92 N. Y. 153; *Topping v. Saddler*, 5 Jones L. 357; *Fairchild v. Chastelleux*, 1 Pa. 176; *Ames v. Norman*, 4 Sneed, 683; *Pollok v. Kelly*, 6 Ir. C. L. 367; *Wyckoff v. Gardner*, 20 N. J. L. 556; *Ward v. Ward*, L. R. 14 Ch. Div. 506; *Godfrey v. Bryan*, Id. 516.

regards the wife's property relations, and whenever realty has been devised to a married woman, free from the control of her husband, these courts have held rigidly to the restrictions of the grant, and denied the husband any exercise of lordship or dominion over the property so acquired. We have previously referred to the liberalizing tendency of modern legislation as typified in the various married women's acts, and it only remains to note the fact that judicial determination is constantly exercised in favor of her entire emancipation from the absurd and repellant features of the common law. It is becoming quite general, in this age, to regard her as of sufficient capacity to manage her own affairs, and treat her in all respects, so far as regards the control of her property, as though she had not committed the unpardonable sin of matrimony. Before marriage she is quite generally accorded the free use of her rights. But because she enters into a peculiar contract, which is said to be "highly favored in the law," it is suddenly discovered that her capacity to care for her own interest has become hopelessly atrophied. The mumbled formula of "Holy Church" by which she is pronounced wedded, is found to carry with it a badge of servitude, and an attribute of peonage — she has nothing she can call her own. Such a driveling insult to her intelligence is not likely to long survive. Russia has emancipated its serfs, the blacks are no longer in bondage, the social lepers of every clime and creed are free, and we shall indulge the hope, that through some miraculous combine of common sense and decency our State legislators will accord common justice to the wives and mothers of the generation yet to be.

§ 442. **Husband and wife may take as joint tenants or tenants in common.** Where real property is conveyed to them during coverture, it would not necessarily follow that they would become tenants by the entirety. If nothing was shown to evince a contrary intent, such would undoubtedly be held to be the relationship of the parties as was decided in *Bertles v. Nunan*, 92 N. Y. 152. The New York Court of Appeals has held in the recent case of *Minar v. Brown*, 133 N. Y. 308, that such tenancy is not created where it appears from the character of the transaction that it was the inten-

tion of the parties that the grantees should take as joint tenants or as tenants in common. To the same effect is *Jones v. Fey*, 129 N. Y. 17. What would be the legal right of the parties where upon a purchase of real property the husband and wife each has contributed from their separate estates, equally or in any other ascertained proportion, to the payment of the consideration, does not as yet seem to have been the subject of judicial decision. It is not necessary, however, to further pursue this mode of reasoning, for it has no value except as it may be instructive by way of analogy. The rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rests upon different grounds than those which support a tenancy by the entirety.

§ 443. Attitude of the courts as to estates by the entirety.

There is a sturdy disposition upon the part of both the State and Federal courts to resist any invasion of the ancient common law doctrine of tenancy by the entirety.¹³²

The whole trend of authorities, however, is in the direction of preserving such tenancies where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title uses apt words for the purpose."¹³³

"And in case of devise and conveyance to husband and wife together, though it has been said that they can take

¹³² *Whiton v. Snyder*, 88 N. Y. 299; *Baker v. Lamb*, 11 Hun (N. Y.), 519; *Wright v. Saddler*, 20 N. Y. 320, 17 Alb. L. J. 393; *Pollock v. Webster*, 16 Hun (N. Y.), 104; *Matteson v. New York Cent. R. Co.* 62 Barb. (N. Y.) 373; *Wright v. Wright*, 54 N. Y. 437; *Taylor v. Young*, 71 Pa. 81; *Laws* 1880, chap. 472; 11 Alb. L. J. 375, 402; 20 Alb. L. J. 162; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep.

64; *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 289; *Gerard*, Real Estate Titles, 2d ed. 72, 84; *Wms. Real Estate*, 5th ed. 225, note.

¹³³ 1 *Preston, Estates*, 132; 3 *Bl. Com.*, Sharswood's note; 4 *Kent's Com.* 363; 1 *Bishop, Married Women*, secs. 616 *et seq.*; *Freem. Co.-ten.* sec. 72; *Fladung v. Rose*, 58 Md. 13-24.

only as tenants by entireties, the prevailing rule is that if the instrument expressly so provides, they may take as joint tenants or tenants in common."¹³⁴ And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise, etc.,¹³⁵ so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture.¹³⁶

§ 444. Dissolution of the tenancy by death or divorce. The integrity of the estate is dependent upon the union effected by the marital relation. Obviously, whenever this relation is terminated or destroyed, the estate which is but a parasite of the relation of matrimony, dies with it. "One legal person has been resolved by judgment of law into two distinct, individual persons, having in future no relations to each other; and with this change in their relations must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold in joint seizin they must hold by moieties."¹³⁷

A recent writer expresses the prevailing view in the following language: "There are differences of judicial opinion regarding this estate, as for example, lands either jointly or in common, so that whatever the terms of a conveyance to them, they will hold by the entirety. Others permit them to take and hold as joint tenants or tenants in common if the deed is in express words that they shall. But all agree that this tenancy does not and cannot exist where there is no marriage. The consequence is that when the marriage ends by divorce it falls."¹³⁸

"The relation of husband and wife is terminated by a decree of divorce, and with it all marital duties. Their interest and duties from thenceforth, as related to each other, were as though they never existed. The estate by the entireties is essentially a joint estate, although it differs in one or two

¹³⁴ Stewart, *Husb. & W.* secs. 307-310; Tiedeman, *Real Prop.* sec. 244.

¹³⁵ Hoffman v. Stigers, 28 Iowa, 310; Brown v. Brown, 133 Ind. 476.

¹³⁶ McDermott v. French, 15 N. J. Eq. 80; Preston on Estates, 132, 2 Bl. Comm. 182, Sharswood's note.

¹³⁷ See note to *Den. v. Hardenbergh*, 18 Am. Dec. 371; 2 Bright, *Husb. & W.* 365.

¹³⁸ Enyeart v. Kepler, 118 Ind. 34, 36, 10 Am. St. Rep. 94, 96; Bishop, *Mar. & Div.* sec. 1644.

particulars therefrom. The power to hold jointly arose from the fact that they were married when the conveyance was made. Had the marriage not existed, the parties would have taken as tenants in common. It was that circumstance, and that alone, which gave to them the joint life estate and the right to joint possession. When the very thing which by operation of law gave them a joint estate was destroyed by operation of the same law, the joint estate ceased, and they then became vested with an estate *per my* as tenants in common. They, by that act, and operation of law flowing from it, are not jointly entitled to possession, but, the unity of title and the unity of estate no longer existing with the incidental right of joint possession, it inevitably follows that they then become tenants in common. The termination of the marriage relation having wrought a change in the rights of the parties in the estate, the court should rather hold that the change is broad enough to convert it into an estate in common, than to hold that whatever change was made it left the right of survivorship. But, on principle, we are satisfied the decree of divorce had the effect to make them tenants in common, and that appellees thereby became entitled to partition." ¹³⁹

§ 445. Rule as to moieties. When a conveyance of land is made to husband and wife, each of the grantees holds the land in fee — not in moieties, but in severalty (*per tout et non per my*, as it is technically expressed), with the right of survivorship. This is the rule in England and in most of the American States. Various legal consequences arise from such a peculiar estate.

By a decree of divorce, the legal unity of person, on which the estate depended, is destroyed; "one legal person has been resolved by judgment of law into two distinct, individual persons, having in future no relations to each other; and with this change in their relations, must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold in joint seizin, they must hold by moieties." ¹⁴⁰

¹³⁹ Harver v. Wallner, 80 Ill. 197. 696; 2 Bright on Husband and Wife.

¹⁴⁰ Ames v. Norman, 4 Sneed (Ky.), 365.

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